CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1928

ELLA C. THOMPSON AND VIRGINIA P. CIBOTTI v. STOKES BUCHANAN, MRS. BERTIE M. WILSON AND R. B. BUCHANAN.

(Filed 22 February, 1928.)

1. Pleadings—Counterclaim—When Can Be Pleaded—Action—Joinder—Actions in Tort, on Contract.

Where the plaintiffs' action is to establish their title to and recover possession of mineral interest in a described 5-acre tract of land, and defendants set up as a counterclaim damages alleged to have been caused by the plaintiffs' slander of their title in 500-acre tract: *Held,* the cross-action alleged is for damages founded upon a tort, and not on contract, and does not fall within the equitable principle of a suit to quiet title, under the provisions of C. S., 519, 521, 522, and a demurrer thereto is good.

2. Evidence Competency—Ancient Records.

Where the plaintiff's right of recovery for mineral interests on a described tract of land, both parties claiming under a common source, is made to depend upon a transfer to plaintiff's antecedent in the chain of title by a recorded paper-writing stating that the grantor in the deed acted solely as the agent for the plaintiff's predecessor in title, and appeared on the registration books as a part of the transaction in regular sequence, though not likewise ordered registered: *Held,* this record undisputed for a long lapse of time will become admissible as an ancient record, and its exclusion will be held reversible error to the plaintiff's prejudice.

APPEAL by plaintiffs from *McElroy, J.,* at July Term, 1927, of MITCHELL. Reversed.

The plaintiffs allege that they "are the owners of and entitled to the immediate possession of all the mineral interest, right and title in and to and upon the following described tract or parcel of land: Situate in Mitchell County, State of North Carolina, on the waters of Cane Creek, beginning on a walnut tree marked 'A' on the Turnpike Road and runs thence a near northwest course to a hole in the ground near the top of a ridge, and near a shaft which was sunk by Love and Company; thence 5° south of west to Charles Burleson's old line; thence with his old line up to said Burleson's line established between him and Jeremiah Hughes; thence with that line to the branch; thence with the branch to the Turnpike Road; thence with the road to the beginning, containing five acres, more or less. That the defendants are in the wrongful and unlawful possession of the mineral interest in and to and upon the aforesaid described tract or parcel of land withholding the same from the plaintiffs."

The defendant, R. B. Buchanan, filed a disclaimer. The other defendants, Stokes Buchanan and Mrs. Bertie M. Wilson, deny the allegations of the complaint. They further answer and allege that they are the owners in fee of 500 acres more or less of land, describing same, "except the defendants, Stokes Buchanan and Bertie M. Wilson, disclaim title to the mines and mineral interest in that small parcel of land included within the red lines, and indicated by the red figures, 1, 2, 3, 4, 5, and 6, on the map hereto attached and filed with this answer as a part thereof, said land being more particularly described and bounded as follows: Beginning on a walnut tree now standing on the north bank of the public road leading from Bakersville to Henson's Creek, and indicated on said map by the red figure 1, and runs north 53° 30′ west 30½ poles to a hole near the top of the ridge and near a shaft which was sunk by Love and Company, as indicated on said map by the red figure 2; thence south 85° west about 12 feet to a stake in Charles Burleson's old line, as indicated on map by figure 3; thence with his old line, north 80° west 30 feet to a stake in said old line, as indicated on said map by the figure (red) 4; thence near east to the branch as indicated on the map by the red figure 5; thence down and with the branch to the public road, aforesaid as indicated on said map by the red figure 6, thence to the beginning, red figure 1."

They further set up, as a counterclaim to remove cloud from title and damages for "Unfounded claims of title to and ownership of the mineral interest, mines, mica and feldspar in the said 500-acre tract hereinbefore described and especially to the Hawk Mines located on said tract, which these defendants leased to various parties for the purpose of being operated and mined for mica," and sets forth in detail the conduct of plaintiffs in slandering the title so that it could not be leased by the answering defendants, and pray: "That they be declared the owners of the mineral interest in the 500-acre tract, except that small strip within the red lines on the map filed herewith, together with the surface or soil in a large part of said tract, thereby removing the cloud from the title. For damages against the plaintiffs in the sum of $5,000. For costs of action and for such other and further relief as to the court may seem right and just."

The record discloses that plaintiffs demurred *ore tenus* to the counterclaim set up by the answer of the defendant. This demurrer the court overruled and plaintiffs excepted and assigned error. The defendants ask that the trial of their cross-action be proceeded with, which motion the court denied and the cross-action continued to the next term of court.

Plaintiffs offered in evidence certain deeds and lease, together with the transfer of said lease from J. K. Irby, Jr., to Heap and Clapp. Defendants objected to the transfer on the ground that there is no proof of the transfer and no order of registration of the transfer. The court admitted so much of said instrument as precedes the transfer signed by J. K. Irby, Jr., and excluded such purported transfer and the affidavit of J. K. Irby, Jr. To the ruling of the court excluding such transfer and affidavit, plaintiffs excepted and assigned error. Plaintiffs offered affidavit of J. K. Irby, Jr., dated 18 July, 1872, and registered as a declaration of trust on the part of J. K. Irby, Jr. Defendants objected and the court sustained their objection and plaintiffs excepted and assigned error.

It is admitted that the deed from Charles Burleson to J. W. Bowman, dated 12 May, 1872, and the deed from J. W. Bowman to Heap and Clapp, dated 13 July, 1872, and the agreement of lease between Charles Burleson and J. K. Irby, which has been admitted by the court, and the purported assignment made by J. K. Irby, and the affidavit of J. K. Irby, which was excluded by the court, follow each other in the order named in Book 7-A. The deed from Charles Burleson to J. W. Bowman, which was executed on 12 May, 1872, was registered 18 October, 1872. The deed from J. W. Bowman to John G. Heap and Elisha B. Clapp, of date 13 July, 1872, was registered 18 October, 1872. The lease from Charles Burleson to J. K. Irby, of date 17 August, 1872, was registered 19 October, 1872. The assignment of J. K. Irby and the affidavit of J. K. Irby, which were excluded by the court, were likewise registered 19 October, 1872.

After reading the several deeds offered by plaintiffs, the court stated that he would hold the deed from Charles Burleson to J. W. Bowman, under which plaintiffs claim as a necessary link in their chain of title, void for uncertainty in the description, in the absence of a lease to Heap and Clapp in evidence and that both sides claiming under the same source of title under the admissions heretofore made plaintiffs could not recover, plaintiffs admitting that said deed was a necessary link in their chain of title connecting with the common source and also admitting that the purported lease, transfer and affidavit, as hereinbefore mentioned, were lost and the originals could not be produced in evidence. To the foregoing holding of the court plaintiffs except, and in deference to such holding submit to a nonsuit, excepted, assigned error and appealed to the Supreme Court.

Plaintiffs offered deed from William Buchanan to Charles Burleson, dated 16 June, 1857, registered in Book 6, p. 164, on 8 May, 1868, in the office of the register of deeds of Mitchell County. The deed is proper in form, describes the land by metes and bounds "containing 500 acres more or less." It is admitted that both parties claim under this deed as a common source of title.

W. B. Council and Squires & Whisnant for plaintiffs.
W. C. Newland, S. J. Ervin and S. J. Ervin, Jr., for defendants.

CLARKSON, J. The first main proposition to be determined: Should the demurrer of plaintiffs to the counterclaim of defendants be sustained? We think so. The law in regard to "Slander of property" is stated in Newell Slander and Libel, 4th ed., part sec. 160, p. 196, as follows: "It permits an action to be brought against anyone who falsely and maliciously defames property, either real or personal, of another, and thereby causes him some special pecuniary damage or loss. As in all other actions dependent upon special damages there must be injury, and damage, the injurious words falsely and maliciously spoken, and the damage, the consequent pecuniary loss to the party whose property is defamed. There can be no action except for the injury, the slanderous words, and no recovery except for special damages." The counterclaim broadly taken is an independent separate cross-action, not related to the main cause of action stated in the complaint.

The allegations in defendants' counterclaim set out fully the slander of title to the 500-acre, more or less, tract of land and demand for damages. This counterclaim is not to quiet title to the *locus in quo*—the five (5) acres more or less claimed by plaintiffs—as in *McLean v. McDonald,* 173 N. C., p. 429, but is an independent separate cross-action in tort and does not come under a most liberal construction of C. S., 519, 521 and 522. *Devries v. Warren,* 82 N. C., p. 356; *Gibson v. Barbour,* 100 N. C., 192; *Smith v. Young,* 109 N. C., p. 224; *Yellow-*

day v. Perkinson, 167 N. C., 144; *Cohoon v. Cooper,* 186 N. C., 26. See *Shearer v. Herring,* 189 N. C., 460.

It is said in *Milling Co. v. Finlay,* 110 N. C., p. 412: "It is not necessary that we consider whether there was any evidence sufficient to go to the jury to support defendants' counterclaim, for we concur with his Honor that the slander charged as the basis thereof was not a counterclaim that could be pleaded to this action. The plaintiff complains that the defendants being indebted to it, accepted a draft drawn on them by the plaintiff and have failed to pay it. The defendants allege that the plaintiff slandered them as to their pecuniary standing, and injured their credit and business and seek damages therefor by way of counterclaim. This did not arise out of contract, and therefore could not be pleaded under subsection 2 of section 244 of The Code (C. S., 521); nor could it be pleaded under the first subsection thereof, because it did not 'arise out of the contract or transaction which was the ground of the plaintiff's claim,' nor was it 'connected with the subject of the action'—the contract made by the acceptance of plaintiff's draft. *Byerly v. Humphrey,* 95 N. C., 151." The demurrer to the counterclaim should have been sustained.

The second main proposition to be determined: Was the lease, assignment or transfer and affidavit admissible as evidence? We think so. It is taken for granted, from the record, that J. K. Irby and J. K. Irby, Jr., are one and the same person. The deed from Chas. Burleson to J. W. Bowman, was made 12 May, 1872, and the same day acknowledged by the grantor before the probate judge and ordered to be registered, and duly recorded 18 October, 1872, and was a necessary link in the chain of title on the part of plaintiffs. It refers to a lease to Heap and Clapp to make certain the description of the land for which plaintiffs bring this action. The record discloses "plaintiffs admitting that said deed was a necessary link in their chain of title connecting with the common source and also admitting that the purported lease, transfer and affidavit, as hereinbefore set out, were lost and the originals could not be produced in evidence."

The purported lease was made on 17 August, 1871, by Chas. Burleson to J. K. Irby. The description in the lease corresponds in substance to the description to the land set forth in the complaint, for which the action is instituted. On the lease from Burleson to Irby is the following: "I hereby transfer all my right, title and interest to the within lease to Heap and Clapp for value received. This 19 August, 1871. J. K. Irby, Jr."

Then there is an affidavit from Irby, dated 18 July, 1872, sworn to before the clerk. Among other statements is the following: "That he, the said J. K. Irby, obtained the said lease from said Burleson as the right of Heap and Clapp, and although he put his own name in the lease as lessee that he was only an agent, as aforesaid, and that Heap and Clapp were and are the real lessees and the only parties interested, and that Charles Burleson so understood the matter at the time that the above lease is the one or the paper described and referred to in a conveyance made by Charles Burleson to J. W. Bowman on 12 May, 1872, and the only lease which Heap and Clapp had from Burleson for said mines and that Heap and Clapp have been operating said mines for some time under said lease."

The deed, lease, assignment or transfer and affidavit follow each other in the order named, and all are recorded on 18 and 19 October, 1872. The lease, assignment or transfer and affidavit were all recorded as parts of the same instrument on 19 October, 1872. It seems that this is indicated by the record, but at least are recorded in consecutive order at the same time.

It is contended by plaintiffs that although the originals of the lease, assignment or transfer and the affidavit (the latter argued by plaintiffs a declaration of trust), are all lost, they are admissible as an ancient record. If they are not admissible as tending to make certain the description in the Burleson deed to Bowman, the action of plaintiffs cannot be sustained. We think that although the originals are lost and not required to be recorded, yet spread on the records for 55 years, in the office of the register of deeds, is such an ancient record that imports verity and truth and ordinarily admissible at least as prima facie evidence.

The principle is stated thus in Wigmore on Evidence, 4 Vol. 2 ed., part sec. 2143, subsec. 5, p. 569: "Where the alleged ancient *original* is *lost* (or otherwise unavailable), and a purporting *official record* is offered, made more than thirty years before, and certifying the deed's contents and execution, but inadmissible as an official record *(ante,* 1648-1649), because not made in accordance with statutory provisions may not this ancient record-copy serve as sufficient evidence of genuineness? It is apparent that the case is not only as strong as the preceding one, but is stronger in two respects, namely, the defects of the record are in a measure technical only and it still is entitled to some consideration as an official statement, and the long publicity of it has given ample opportunity for correction and opposition if any just ground existed for doubting the original authenticity. Accordingly, there has been a general disposition, on one ground or another, to accept such an ancient record, though otherwise inadmissible, as sufficient, after the lapse of time. . . . This conclusion has been usually accepted. The rulings to the contrary seem rarely, if ever, to have gone upon any supposition that the ancient document rule was in itself impossible to apply to a copy, but rather upon the lack of confirming circumstances in the case in hand. Moreover, the fact of possession of the land, as a confirming circumstance, seems often to be here insisted upon, irrespective of its general requirement." *Cedar Works v. Pinnix,* 208 Fed., 785; *Davis v. Higgins,* 91 N. C., p. 382; *Nicholson v. Lumber Co.,* 156 N. C., 59. The execution of the lease was duly proven and certified to be registered, and the lease, assignment or transfer and affidavit, are all recorded in consecutive order. The hearsay rule gives way to the ancient doctrine rule and is admissible ordinarily at least as prima facie evidence of the truth of the contents.

For the reasons given the judgment of the court below is
Reversed.

H. A. LITCHFIELD v. J. K. REID, SHERIFF, ET AL.

(Filed 22 February, 1928.)

1. **Evidence—Burden of Proof—In Tax-payer's Suit to Enjoin Sale of His Land—Tax Sales.**

   In a taxpayer's suit to enjoin the sheriff from selling his lands for the nonpayment of his taxes, based upon whether his check given therefor has been paid by the drawee bank, the burden is upon him to show this fact when he relies thereon.

2. **Evidence—Materiality—Sufficiency to Go to Jury—Tax Sales.**

   Where in a taxpayer's suit to enjoin the sale of his land for the nonpayment of taxes he introduces evidence tending to show that a check given and accepted therefor was returned to him by the payer bank, which that day became insolvent, marked "paid," and other evidence was introduced tending to show that notwithstanding this the check was in fact not paid, and there was no evidence as to by whom the check was presented nor mode of payment: *Held,* the evidence is sufficient to be submitted to the jury.

3. **Evidence—Presumptions—Banks and Banking—Checks.**

   Where a check passes through several banks in the course of collection "pay to any bank or order," and is marked paid by the drawee bank, and returned to the maker, there is at least a presumable inference of fact that it was paid in money to some bank as the holder thereof.

APPEAL by plaintiff from *Moore, Special Judge,* at October Term, 1927, of WASHINGTON. New trial.

Action to restrain and enjoin defendant, J. K. Reid, as sheriff of Washington County, from selling property of plaintiff for the collection of taxes for the year 1924.

Plaintiff alleges that he paid his taxes for the year 1924 on 3 January, 1925, by check, and that said check was duly paid, on presentation, by the bank on which it was drawn. Defendant denies the allegation that said check has been paid. He contends that plaintiff's taxes for the year 1924 have not been paid by check as alleged or otherwise.

From judgment, at the close of all the evidence, dissolving the temporary restraining order, which had been continued to the hearing, and dismissing the action, plaintiff appealed to the Supreme Court.

Ward & Grimes for plaintiff.
Van B. Martin for defendant.

CONNOR, J. The amount assessed against plaintiff as taxes for the year 1924 in Washington County was $366.66. On 3 January, 1925, plaintiff drew his check, payable to W. D. Peele, or order, on the United Commercial Bank of Plymouth, N. C., for said sum. W. D. Peele, payee of said check, was a deputy sheriff of Washington County, residing at Creswell, N. C., and as such deputy sheriff was duly authorized by defendant, J. K. Reid, sheriff of said county, to collect said taxes. The said check was delivered by plaintiff to said W. D. Peele and was accepted by the said Peele in payment of said taxes, immediately after it was drawn. Upon the delivery to him of said check, the said deputy sheriff gave to plaintiff the sheriff's receipt, taken from the tax books, for said taxes.

W. D. Peele, payee of said check, endorsed the same, and deposited it to his credit on 3 January, 1925, with the Bank of Creswell. It was thereafter duly presented to the United Commercial Bank of Plymouth, N. C., the drawee bank, for payment. At the time the check was drawn by plaintiff, and also at the time it was presented for payment, plaintiff had on deposit with the drawee bank a sum in excess of the amount of the check. The check was charged to the account of plaintiff by the drawee bank, and at the end of the month was returned to him, with other canceled checks. His bank statement showed that the amount of the check had been deducted from his deposits. The check when thus returned to plaintiff, in addition to the endorsement of W. D. Peele, the payee, bore the endorsements of the Bank of Creswell, dated 3 January, 1925; of the Virginia National Bank, Norfolk, Va., dated 5 January, 1925; and of the Wachovia Bank and Trust Company, dated 6 January, 1925. The check was also stamped or perforated as follows: "Paid 1/13/25." It was admitted that this stamp or perforation was made by the United Commercial Bank, upon which the check was drawn.

On 13 January, 1925, the United Commercial Bank of Plymouth closed its doors and ceased to do business. It was thereafter declared insolvent, and a receiver has been duly appointed for it. On or about 2 February, 1925, W. D. Peele was notified by the Bank of Creswell that plaintiff's check, which had been deposited by him with it on 3 January, 1925, had not been paid by the drawee bank, upon presentation, and that his account with said Bank of Creswell had been charged with the amount of said check. Defendant, J. K. Reid, sheriff of Washington County, thereafter advertised plaintiff's property for sale for the collection of his taxes for the year 1924, upon his contention that said taxes had not been paid. Pending the advertisement, this action was begun by plaintiff to restrain the said sheriff from selling his property, upon his contention that he had paid his taxes by his check payable to W. D. Peele on the United Commercial Bank of Plymouth. These respective contentions present the question as to whether plaintiff's check, given by him and accepted by defendant's deputy in payment of plaintiff's taxes for 1924, has been paid by the drawee bank.

Upon the conclusion of the evidence tending to show the facts to be as hereinabove stated, the court was of opinion that plaintiff was not entitled to the relief demanded in this action, and in accordance with said opinion rendered judgment dissolving the restraining order and dismissing the action. Plaintiff excepted to the judgment, and upon his appeal to this Court relies upon his assignment of error based upon this exception.

The burden of the issue raised by the pleadings in this action, involving the question as to whether plaintiff has paid his taxes for the year 1924, is upon the plaintiff. The evidence offered by him on the trial was sufficient to sustain this burden. It tends to show that the check which he gave to the deputy sheriff, and which the said deputy sheriff accepted in payment of his taxes, was paid by the bank on which it was drawn. It is true that it appears that the bank closed its doors on the day the check was marked paid. There is no evidence tending to show by whom the check was presented to the drawee bank for payment, nor to whom the payment was made. The check was endorsed by the payee without restriction and thereafter transferred by the endorsement of the Bank of Creswell, which was not the holder of the check at the date of its presentment for payment. The last endorsement was "pay to any bank or order." Nor is there evidence tending to show how the check was paid—whether by money or by check or draft drawn by the bank. In the absence of evidence tending to show payment otherwise, an inference of fact is, at least, permissible that it was paid in money to some bank as the holder thereof. There was error in holding that the evidence was not sufficient to be submitted to the jury upon plaintiff's contention that the check was paid by the drawee bank and that he had thereby paid his taxes for 1924.

The questions decided in *Bank v. Barrow,* 189 N. C., 303, and in *Graham v. Warehouse,* 189 N. C., 533, are not presented upon this record. The questions decided in these cases arise only where there is evidence tending to show that the drawee bank accepted the check of its depositor for payment, and undertook to pay the same, not with money, but with its check or draft upon another bank, which thereafter failed or refused to pay the same. In both the cited cases the check or draft of the drawee bank, given in payment of its depositor's check, was not paid by the bank on which it was drawn, and the question presented for decision was whether or not the depositor's check, upon the facts of each case, had been paid. In *Graham v. Warehouse* it is said in the opinion for the Court: "In any event, at the commencement of this action, plaintiff was indebted to Lawson in the sum of $219.60, either because the amount of his deposit has not been paid, or if it was paid, because he has been subrogated to the rights of the American Exchange National Bank in and to the check, which includes the proceeds of the collection of Lawson's check, payable to Weinstein." In *Bank v. Barrow* it was held that plaintiff, the payee of the check, could not recover in the action to foreclose a mortgage because it had accepted defendant's check in payment of the note secured by the mortgage, and had failed to exercise due diligence in presenting the check to the drawee bank for payment. In *Morris v. Cleve,* 193 N. C., 389, it was held that plaintiff could not recover on the note which defendant had executed because upon the facts alleged in the complaint plaintiff was not the holder of the note. It is said in the opinion in that case: "It is immaterial whether said check has in fact been paid by the Bank of Vanceboro, on which it was drawn, or not; the Bank of Washington, as holder of said check, if it has not been paid, can alone recover of defendants as drawers of the check, the amount due thereon." The liability to its customer of a bank, which has accepted for collection and deposit to its customer's credit, a check drawn on another bank, from which it has accepted in payment of said check, a check or draft on still another bank, is discussed, with full citation of authorities in *Barnes v. Trust Co.,* 194 N. C., 371.

In the instant case there is no allegation of negligence on the part of the payee or of any subsequent holder of the check, with respect to its presentation to the drawee bank for payment. The check was issued on 3 January, 1925; it was presented for payment on or before 13 January, 1925; when the check was accepted for payment by the drawee bank, it was charged to the account of the drawer, and subsequently returned to him, stamped or perforated, "Paid, 1/13/25." There is no evidence tending to show what disposition was made by the drawee bank of the amount charged to its depositor, the drawer of the check, on account of the same. Upon the facts shown by the evidence, plaintiff has no concern as to such disposition. The jury might have found from the evidence that the proceeds of the check were paid to the holder of the check, who presented it for payment, and who had the right, if he chose to exercise it, to demand money for said check. There is no evidence that said check was presented "by or through any Federal Reserve Bank, postoffice, or express company or any respective agents thereof." 3 C. S., 220(AA), formerly section 2 of chapter 20, Public Laws 1921, of North Carolina, therefore has no application to this case, nor is the well-considered decision of the Circuit Court of Appeals, Fourth Circuit, in *Cleve et al. v. Craven Chemical Company et al.*, 18 F. (2d), 711, authoritative upon the question here presented.

There is error in the judgment dissolving the restraining order and dismissing the action, upon the ground that upon all the evidence plaintiff is not entitled to recover. The issue as to whether the plaintiff had paid his taxes for the year 1924, involving the question as to whether his check, given and accepted in payment of same, was paid by the drawee bank, should have been submitted to the jury, with appropriate instructions. The judgment is set aside in order that there may be a

New trial.

MRS. O. F. GILBERT AND O. F. GILBERT, HER HUSBAND, v. S. G. WRIGHT.

(Filed 22 February, 1928.)

Evidence—Parol Evidence—Admissibility to Explain Written Instrument—Patent and Latent Ambiguities—Statute of Frauds.

While parol evidence is not admissible to identify the lands to be conveyed in a written instrument of sale when the ambiguity or insufficiency of the instrument is patent, it is otherwise when the instrument itself is latently ambiguous in this respect, but may be explained by parol with certainty as to its identity within the understanding of the parties to the contract.

APPEAL by defendant from *Moore, Special Judge,* at October Special Term, 1927, of PASQUOTANK. Affirmed.

Action for specific performance. Mrs. R. W. Parsons owned a lot situated in Elizabeth City on Pennsylvania Avenue and Cypress Street, and the *feme* plaintiff owned an adjoining vacant lot. Some time before 1 January, 1925, Mrs. Parsons, Mrs. Gilbert, and the defendant entered into the following agreement:

"Agreement made between O. F. Gilbert, agent, for Mrs. R. N. Parsons and Dr. S. G. Wright of a sale of her home property on Pennsylvania Avenue and Cypress Street. O. F. Gilbert sells the property for Mrs. Parsons for five hundred dollars and other considerations; deed to be forwarded draft attached to the First and Citizens National Bank for balance due. Dr. Wright agrees to buy the vacant lot from Mrs. O. F. Gilbert during the month of January, 1925, for the sum of fifteen hundred dollars. Check for five hundred dollars is hereby acknowledged by O. F. Gilbert.

"O. F. GILBERT, Agent.
S. G. WRIGHT."

The defendant refused to comply with his contract with the *feme* plaintiff, and she brought suit to compel him to accept a conveyance of the lot and to pay the purchase price. At the close of the plaintiff's evidence the defendant moved for judgment of nonsuit; whereupon the parties agreed that if the motion was not granted the plaintiff should have judgment for the purchase price and for costs. The motion was refused and judgment was signed in accordance with the agreement. The defendant excepted and appealed.

J. B. Leigh and McMullan & LeRoy for plaintiffs.
Aydlett & Simpson for defendant.

ADAMS, J. The defendant has accepted from Mrs. Parsons a conveyance of the "home property on Pennsylvania Avenue," but has refused a deed for "the vacant lot" on the ground that the alleged contract with Mrs. Gilbert does not comply with the Statute of Frauds and cannot be enforced. C. S., 988. His specific objection is that the description of the property is insufficient; that the location of the lot is not given; that the owner is not designated, and that parol evidence is not admissible "to fit the description to the thing."

If the parties leave the subject of their contract in a state of absolute uncertainty the courts will not ordinarily decree specific performance; as, for example, where property is described as "a certain parcel of land in the county of Person, to contain by contract 200 acres," or as "a plantation and permanent home for life." *Allen v. Chambers,* 39 N. C., 125; *Mallory v. Mallory,* 45 N. C., 82. In such case parol evidence is not admissible in aid of the description. But the rule excluding parol evidence has its limitations. While the contract must contain a description of the land to be sold, it is not essential that the description be so minute or particular as to make resort to extrinsic evidence unnecessary. *Lewis v. Murray,* 177 N. C., 17. The line of separation is the distinction between a patent and a latent ambiguity. If the ambiguity is patent the instrument must speak for itself and evidence *dehors* is not admissible in explanation; but if it is latent, evidence *dehors* is both competent and necessary. The former raises a question of construction;

the latter a question of identity. *Institute v. Norwood,* 45 N. C., 65; *Capps v. Holt,* 58 N. C., 153; *Harrison v. Hahn,* 95 N. C., 28. Several cases illustrating the distinction and stating the principle upon which it rests are cited in *Farmer v. Batts,* 83 N. C., 387, and in *Blow v. Vaughan,* 105 N. C., 198, to which may be added a number of others more recently decided.

In *Carson v. Ray,* 52 N. C., 609, the premises which were the subject of the contract were described as "my house and lot in the town of Jefferson in Ashe County, North Carolina"; and it was held that the description was sufficiently certain to identify the property. After suggesting that such a description as "*a* house and lot" or "*one* house and lot" would be too indefinite and that the words "my house and lot" import particular property, the Court said: "Where the deed or will does not itself show that the grantor or devisor had more than one house and lot, it will not be presumed that he had more than one; so that there is no patent ambiguity; and if it be shown that he has more than one, it must be by extrinsic proof, and the case will then be one of a latent ambiguity, which may be explained by similar proof."

In *Murdock v. Anderson,* 57 N. C., 77, the property was described as "one house and lot in the town of Hillsborough," not "my house and lot," as quoted in *Blow v. Vaughan, supra;* and although this description is followed by the clause "purchased of me by him for the sum of three hundred and fifty dollars," there was no written instrument other than the receipt itself to show what property had been purchased. Upon these facts it was decided that there was no sufficient compliance with the Statute of Frauds. A similar controversy arose in *Phillips v. Hooker,* 62 N. C., 193, in which the Court was called upon to construe the words, "I do agree for Mrs. Hooker to make a deed for her house and lot north of Kinston, to the said John R. Phillips." It was objected that the contract could not be enforced because the note or memorandum was too vague and indefinite, but the Court made this comment: "In noticing this objection, we must bear in mind that a note or memorandum of a contract is, in its very essence, an informal and imperfect instrument. Its object is to furnish aid to the memory of a transaction and, though it must distinctly set forth all the material terms of the contract *(Mallory v. Mallory,* 45 N. C., 80), it will answer the purpose, if it do so in such words as will enable the court, without danger of mistake, to declare the meaning of the parties. An agreement by a person having a fee-simple interest in land to make a deed for it, is universally understood (in the absence of anything to show the contrary) to mean a deed to convey the fee. So as to the location of the property, when it is said in common parlance that a house and lot is north of a particular town, it would always be understood as being situated somewhere in the vicinity of the north part of the town. At all events, when the house and lot are spoken of as her house and lot, and the defendant admits that she had but one in the county, there can be no difficulty about the identification. Under such circumstances the description becomes specific and certain, just as a legacy of 'my twenty-five shares of bank stock,' the testator having just that number of shares, would be specific, while a bequest of twenty-five shares, without the addition of the word 'my' would be a general legacy. *Davis v. Cain,* 36 N. C., 304. In this respect the present case differs materially from those of *Allen v. Chambers,* 39 N. C., 125; *Plummer v. Owens,* 45 N. C., 254; *Murdock v. Anderson,* 57 N. C., 77, and *Capps v. Holt,* 58 N. C., 153, referred to by the defendant's counsel."

Applying these principles, we conclude that the ambiguity complained of is latent, and that the identification of the vacant lot may be aided by evidence aliunde. While the phrase "the vacant lot" would not of itself be sufficient, according to the plaintiff's evidence which on the motion for nonsuit must be accepted as true, both the title and the location are sufficiently certain. That is sufficiently certain which can be made certain. This maxim sets forth a rule of logic as well as of law, and is peculiarly applicable in the construction of written instruments. Broom's Legal Maxims, 599. Manifestly Mrs. Gilbert has the title: "Dr. Wright agrees to buy the vacant lot from Mrs. O. F. Gilbert." In substance the lot is designated as her property. It is the "only lot she has anywhere." It adjoins the one which the defendant purchased from Mrs. Parsons. This fact the defendant knew when the contract was executed: each line had been pointed out to him, and the practical effect of his purchase from Mrs. Gilbert will be to extend the boundaries of the Parsons lot. The contract must be construed in its entirety, not the last paragraph alone; and in view of this principle and the attendant circumstances the expression "the vacant lot" implies proximity to the lot described in the second paragraph of the memorandum. The controlling principle is set forth in *Norton v. Smith,* 179 N. C., 553: "The most specific and precise description of the property intended requires some proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement." The judgment is

Affirmed.

SARAH J. SAUNDERSON v. F. J. SAUNDERSON ET AL.

(Filed 22 February, 1928.)

1. **Judgments—On Trial of Issues—Conformity to Verdict—Dower.**

Where the wife's cross-action for divorce *a mensa* is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a divorce absolute upon consent of the parties, the judgment is a nullity; and upon the husband's death the wife is entitled to her dower allowed by statute. C. S., 1662.

2. **Courts—Jurisdiction—By Consent of Parties.**

Where a judgment is entered in a suit for a divorce contrary to that permissible by the verdict, the consent of the parties thereto cannot confer jurisdiction or render the judgment valid.

APPEAL by defendants from *Midyette, J.*, at September Term, 1927, of CURRITUCK. No error.

Proceedings for allotment of dower. Plaintiff alleges that she was the wife of J. H. Saunderson at the date of his death, and that as his widow she is entitled to dower in the lands of which he died seized and possessed. Defendants, who are the heirs at law of the said J. H. Saunderson, deny that plaintiff was his wife, at the date of his death. They allege in their answer that the bonds of matrimony once existing between plaintiff and deceased were absolutely dissolved by a decree of the Superior Court of Currituck County at Fall Term, 1899. Plaintiff in her reply, denies this allegation in the answer of defendants.

The issue submitted to the jury was answered as follows:

"Is the plaintiff entitled to dower in the lands of J. H. Saunderson, as alleged in her complaint? Answer, Yes."

From judgment on the verdict, defendants appealed to the Supreme Court.

Aydlette & Simpson for plaintiff.
Ehringhaus & Hall for defendants.

CONNOR, J. This is a proceeding for allotment of dower. All the allegations of the petition are admitted in the answer, except the allegation that plaintiff was the wife of J. H. Saunderson at the date of his death. Defendants, who are his heirs at law, deny this allegation. They admit that the said J. H. Saunderson and the plaintiff intermarried some time prior to 1897; they allege in their answer that "at Fall Term, 1899, of the Superior Court of Currituck County, a decree of absolute divorce was signed after a jury verdict in said Superior Court, and that the bonds of matrimony theretofore existing between the said J. H. Saunderson and S. J. Saunderson were forever dissolved, reference to said decree being hereby made, and to the records of Currituck Superior Court."

At the trial, defendants offered in evidence the Minute Docket, Fall Term, 1899, of the Superior Court of Currituck County. The following judgment and decree is recorded on page 146 of said minute docket:

"North Carolina—Currituck County.
Superior Court—Fall Term, 1899.

J. H. Sanders v. S. J. Sanders.

Decree.

This cause having been tried at Fall Term, 1898, of this court, and a jury duly empaneled having found all the issues in favor of defendant, who asks for a divorce:

Now, on motion of E. F. Aydlett, of defendant's counsel, it is considered, adjudged and decreed by the court, that the bonds of matrimony heretofore existing between the plaintiff, J. H. Sanders, and the defendant, S. J. Sanders, be and the same are hereby forever dissolved; and that the plaintiff pay the costs of this action to be taxed by the clerk of this court.

And it is further adjudged by agreement that the order heretofore made in this cause granting alimony *pendente lite,* be and the same is hereby vacated and annulled, and that the plaintiff be relieved, and he is hereby relieved from making any further payment thereof.

Let this decree be enrolled.

H. R. STARBUCK,
Judge Presiding.

Approved:
T. G. Skinner, attorney for plaintiff.
E. F. Aydlett, attorney for defendant."

It was admitted that the plaintiff therein named as J. H. Sanders, is the identical person as J. H. Saunderson, formerly the husband of the plaintiff herein, and that plaintiff herein named as Sarah J. Saunderson is the identical person therein named as S. J. Sanders.

Plaintiff thereafter offered in evidence that part of the Minute Docket of Currituck Superior Court, page 109, Fall Term, 1898, which reads as follows:

"J. H. Sanders, plaintiff, v. Sarah J. Sanders, defendant.

This cause coming on for trial, and both plaintiff and defendant being present, and represented by counsel, say they are ready for trial. Then comes the following jury to try this case, to wit: J. W. Newman, J. L. Waterfield, Jerry Davis, Ashley Carbell, E. W. Baum, John Conway, A. Cherry, W. A. Garmstead, Alexander Owens, Ferdinand Bonney, W. L. Owens, C. G. Aydlette, being chosen, tried, sworn and empaneled, say they find the issues submitted in favor of defendants, as follows:

1. Were plaintiff and defendant married as alleged? Answer: Yes.

2. Have plaintiff and defendant been residents in the State for two years next before action brought? Answer: Yes.

3. Has plaintiff since marriage, by cruel and inhuman treatment, broken down defendant's health and made her life with him burdensome and unbearable? Answer: Yes.

4. Did plaintiff drive defendant into the yard in the night of November and December, 1895, force her to remain there, threatening her life and accusing her with disgraceful conduct as set forth in sections six and seven of the complaint? Answer: Yes.

5. Did plaintiff, in night time, during months of November and December, 1895, drive defendant into his barn and stable, and force her to remain there, and threaten defendant's life and accuse her of disgraceful conduct, as stated in sections six and seven of defendant's complaint? Answer: Yes.

6. Has this conduct been so continued and repeated and of such kind as to render defendant's condition intolerable and life burdensome? Answer: Yes."

All the original papers in the action entitled "J. H. Sanders v. S. J. Sanders" have been lost. It was admitted that they cannot be found, although a diligent search had been made for them. Entries on the Minute Docket of the Superior Court of Currituck County were offered in evidence, showing that the action in which the decree was rendered, at Fall Term, 1899, and in which the issues were answered by the jury at Fall Term, 1898, was pending in said court prior to May, 1898. An original summons in an action entitled "James H. Sanders v. Sarah Jane Sanders," dated 24 August, 1899, returnable on the first Monday in September, 1899, was offered in evidence. It is manifest that the issues were submitted to the jury and the decree rendered by the court in the action pending prior to the date of said summons. It is also manifest that the judgment and decree at Fall Term, 1898, was rendered upon the verdict of the jury at Fall Term, 1898. This verdict is specifically referred to in the judgment, and thereby incorporated therein. There was no evidence that any issues were submitted to or answered by the jury at Fall Term, 1898, other than those entered on the Minute Docket of said term.

The court was of opinion that the judgment and decree at Fall Term, 1899, purporting to dissolve absolutely the bonds of matrimony theretofore existing between J. H. Sanders (Saunderson) and S. J. Sanders (Saunderson) was void, and thereupon instructed the jury that if they believed the evidence, and found the facts to be as shown thereby, they should answer the issue, "Yes." Defendants excepted to this instruction, and upon their appeal to this Court assign same as error.

This assignment of error cannot be sustained. Upon the facts found by the jury, as shown by their verdict, the court was without power or jurisdiction to render a decree of absolute divorce. Its jurisdiction with respect to actions for divorce, whether absolute or from bed and board, is altogether statutory. The grounds for divorce, either absolute or from bed and board, are prescribed by statute. Upon the facts found by the jury, the court had jurisdiction to grant a divorce from bed and board; it did not have jurisdiction to grant an absolute divorce. The judgment and decree signed by the judge presiding at Fall Term, 1899, purporting to dissolve the bonds of matrimony theretofore existing between the parties to the action upon the verdict of the jury at Fall Term, 1898, is void. It is a "mere nullity." *Ellis v. Ellis,* 193 N. C., 216. The fact that the judgment is approved by attorneys for plaintiff and defendant does not make it valid, for it is well settled that consent of the parties to an action does not confer jurisdiction upon a court to render a judgment which it would otherwise have no power or jurisdiction to render. With respect to an action for divorce, it is prescribed by statute in this State that no judgment shall be given in favor of the plaintiff until the material facts alleged in the complaint have been found by a jury. C. S., 1662. This statute is of course applicable to a defendant who files a cross-action, and prays for divorce therein from the plaintiff. *Cook v. Cook,* 159 N. C., 47.

The identical question presented by this appeal was decided by this Court in *Ellis v. Ellis,* 190 N. C., 418. In the opinion in that case by *Stacy, C. J.,* it is said:

"The judgment of divorce, therefore, was entered directly contrary to the statute, which provides that 'no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury.' The material facts have not been found by the jury in the instant case, and hence the court was without power or authority to enter the judgment dissolving the bonds of matrimony existing between the parties. *Bank v. Broom Co.,* 188 N. C., 508. A judgment of divorce entered without power or authority on the part of the court to render it is void. *Clark v. Homes,* 189 N. C., p. 708. To hold otherwise would be to sanction a divorce for cause not given by statute; and causes for divorce are statutory in North Carolina." The Court's opinion in the instant case that the judgment signed at Fall Term, 1899, of the Superior Court of Currituck County is void, is in full accord with the law as declared by this Court in *Ellis v. Ellis,* 190 N. C., 418, and 193 N. C., 216. We find

No error.

EVERETT B. CLARK SEED COMPANY v. JENNETTE BROTHERS COMPANY.

(Filed 22 February, 1928.)

1. **Contracts—Construction—Conditions—Breach.**

Where the contract for the sale of goods to be shipped at stated intervals with certain terms of credit to the purchaser, provides that at the seller's election he has the right to demand cash payment, if at any time it considered that the purchaser's credit was unsatisfactory, evidence that the purchaser became in arrears under the contract by inability to pay according to its terms, is sufficient for the seller to exercise his right to cancel the credit, and to demand cash before making further shipments according to the other terms of the contract.

2. **Contracts—Actions for Breach—Requisites.**

A party to a contract cannot maintain an action to recover damages from the other party for its breach, without showing performance or readiness to perform the material obligations resting upon him thereunder, as a consideration therefor.

3. **Appeal and Error—Review—Remand.**

Where the plaintiff is entitled to judgment in an action arising on contract, wherein the defendant sets up a counterclaim that cannot be maintained, and each is given judgment against the other, respectively, the case will be remanded for a proper judgment to be rendered in the lower court.

APPEAL by plaintiff from *Moore, Special Judge,* at Special October Term, 1927, of PASQUOTANK. Reversed and remanded.

Action upon note executed by defendants and payable to plaintiff. In defense, defendants plead as a counterclaim damages resulting from breach of contract by plaintiff. At the close of the evidence plaintiff moved for judgment as of nonsuit upon the counterclaim. Motion denied.

The issues submitted to the jury were answered as follows:

"1. Are the defendants indebted to plaintiff, and if so, in what sum? Answer: $1,195.

"2. Did the plaintiff and the defendants enter into the contract of March 15, 1924? Answer: Yes.

"3. Were the defendants ready, able and willing to comply with said contract? Answer: Yes.

"4. Did the plaintiff wrongfully refuse to comply with said contract? Answer: Yes.

"5. What damage, if any, are the defendants entitled to recover? Answer: $1,162.50, with interest from 1 February, 1925."

From judgment upon the verdict, plaintiff appealed to the Supreme Court.

Worth & Horner for plaintiff.
Aydlett & Simpson for defendants.

CONNOR, J. The first and second issues were answered by consent. Defendants admitted the execution of the note set out in the complaint; there was no controversy as to the amount due on this note. Plaintiff admitted the contract as alleged in the answer, but denied its breach, as alleged therein. The controversy between the parties was, therefore, submitted to the jury upon the third, fourth and fifth issues. The burden upon these issues was upon defendants. At the close of the evidence offered by defendants upon these issues plaintiff moved for judgment as of nonsuit upon defendant's counterclaim, and duly excepted to the refusal of the court to allow its motion. No evidence was offered by plaintiffs.

Upon its appeal to this Court plaintiff relies chiefly upon its assignment of error based upon its exception to the refusal by the court of its motion for judgment as of nonsuit upon defendants' counterclaim. *Tarault v. Seip,* 158 N. C., 363.

By its contract with defendants, dated 15 March, 1924, plaintiff agreed to sell and deliver to defendants, on or before 1 December, 1924, f.o.b. Greenbay, Wisconsin, certain seed, in the amounts, at the prices and subject to the terms and conditions therein set out. With respect to the payment by defendants for said seed, it is provided as follows:

"4. Payment by the purchaser of the purchase price shall be made either by a sixty days acceptance, or less a discount of 1½% if paid in ten days from date of shipment of seeds; provided, however, that if at any time the financial condition of the purchaser becomes unsatisfactory to the seller, the purchaser agrees upon the receipt of written notice to that effect, and upon demand by the seller, to pay for the seeds forthwith in advance of delivery, less a cash discount of one-half of one per cent per month, from date payment is made to the first day of March next following. In the event that such payment is not made within ten days from the receipt of such demand for payment, the seller shall have the right to cancel this contract."

On 10 November, 1924, plaintiff wrote to defendants, advising them that it was ready to ship the seed, in compliance with the contract. Defendants did not reply to this letter. On 1 December, 1924, plaintiff again wrote to defendants as follows:

"Our letter of 10 November remains unanswered. We, therefore, hereby give you notice that we require payment in advance of shipment for the seed peas due you on your contract order with us dated 15 March, 1924. Provided said payment is not received by us in accordance with the provisions of that contract within 10 days from this date, namely, not later than 10 December, and unless said payment includes $1,000, due us from last season's account with accrued interest, shipment will not be made, and we shall regard the contract of 15 March, 1924, canceled, and thereafter null and void."

This letter was received by defendants, who replied thereto on 8 December, 1924, as follows:

"We are in receipt of your letter of 1st inst. We carefully note all you have to say. In regard to your letter of 10 November, we have never seen same until today. We have been hunting for it since receiving your letter. We found it discarded with some old letters, and it had never been opened. Of course we are willing for you to include the old account in the draft. You stated in your letter you expected us to pay in advance of the shipment, including the old account. You didn't include any bill and didn't say what percentage you expect to deliver. Now we are sorry this has occurred and sorry we have kept you out of your money, but we have never had the slightest intention you should lose it, but we have just been up against it and could not help it. We will show you before our dealings are over that we did the best we could."

Defendants at no time thereafter paid or offered to pay the purchase price of the seed in advance, as demanded in writing by plaintiff. By the express terms of the contract plaintiff, therefore, had the right to cancel the contract, and thereby relieve itself of further obligations thereunder. This it did. The contract having been rightfully canceled by plaintiff, defendants are not entitled to recover upon their counterclaim.

There was no evidence tending to show that defendants at any time after 1 December, 1924, and prior to the cancellation of the contract by plaintiff, were ready, willing or able to comply with plaintiff's demand that the purchase price of the peas should be paid in advance of delivery of same to defendants f.o.b. Greenbay, Wisconsin. All the evidence tends to show that defendants were urging plaintiff to waive its right to demand payment in advance, and to ship the peas before such payment, upon the ground that they were unable to pay in advance, because of their financial condition. Plaintiff had no right under the contract to demand payment of the balance due on the previous year's business, as a condition precedent to delivery, but defendants made no objection to this demand, nor did they offer to pay the sum which plaintiff had a right to demand under the contract.

It is well settled that a party to a contract cannot maintain an action to recover damages for its breach by the other party, without showing performance or readiness to perform his part of the contract. In the absence of such showing, there can be no recovery by him on the contract. *Edgerton v. Taylor,* 184 N. C., 571.

There was error in refusing plaintiff's motion for judgment as of nonsuit, at the close of all the evidence, upon defendant's counterclaim. For this error the judgment must be reversed. Plaintiff is entitled to judgment against defendants upon the answer to the first issue. The action is remanded that judgment may be so entered in the Superior Court.

Reversed and remanded.

ELIZA B. BRANCH ET AL. v. J. M. SAUNDERS AND M. S. COX, COPARTNERS, TRADING AS SAUNDERS & COX.

(Filed 22 February, 1928.)

Drainage Districts—Assessments—When They Become Lien on Land.

Liens on lands within a statutory drainage district for assessment charges for its maintenance and upkeep do not fall within a warranty or covenant against encumbrances contained in a deed until they are due and payable, within the intent and meaning of the statutes regulating the subject.

CIVIL ACTION before *Moore, Special Judge,* at November Term, 1927, of BEAUFORT.

This is a controversy without action submitted upon an agreed statement of facts.

Little Swift Creek Drainage District was duly formed according to law. At the time of the formation of said district the plaintiffs were the owners of the land in controversy and are now the owners thereof. The plaintiffs' lands contained 1,495 acres. Nine hundred and twenty acres of said land are situate within the boundaries of said drainage district and five hundred and seventy-five acres of said land are not so situate, but the entire tract of 1,495 acres constitutes one body of land. The district has duly issued and sold drainage bonds and the defendants have agreed to purchase "all the timber and trees of all kinds and size whatsoever, now standing, growing or lying on the land . . . for the sum of eight thousand dollars; that under said contract the defendants may enter upon said land and cut and remove said timber at any time prior to 1 March, 1929, but said contract contains a provision that the defendants may extend the time for cutting and removing said timber and trees for twelve months from 1 March, 1929, by paying to the plaintiffs, on or before that date, the sum of $950. That it is provided in said contract that the timber and trees growing on said land are to be conveyed free and clear of any and all liens and encumbrances, and especially free and clear of any lien in favor of Little Swift Creek Drainage District for taxes or drainage assessments hereafter to become due and payable."

It further appears from the agreed case that drainage assessments upon the land in said district are payable in twenty-four annual installments, and that all installments have been paid by the plaintiff up to and including 1 September, 1926. That plaintiffs have offered to pay the assessments due 1 September, 1927, but have declined to pay the assessments due 1 September, 1928, and all other assessments maturing subsequent to said date.

The defendants declined to accept the deed for said timber and pay the purchase money upon the ground that the unmatured installments constitute a lien upon the timber. Plaintiffs contend to the contrary.

The statement of facts discloses the following agreement between the parties: "If the assessments coming due 1 September, 1928, and annually thereafter until 1 September, 1946, are a lien on the timber and trees situate both within and without or on timber within the drainage district, then the deed tendered by plaintiffs is insufficient to comply with the terms and provisions of the contract between plaintiffs and defendants. But if the assessments in favor of Little Swift Creek Drainage District, becoming due and payable 1 September, 1928, and annually thereafter, are not liens on said timber, then the deed complies with the contract between plaintiffs and defendants, and plaintiffs are entitled to a decree directing the defendants to comply with the terms and provisions of the contract."

Upon the facts and agreement, as presented, the trial judge held that the deed tendered was in compliance with the contract and ordered the defendants to accept the deed and pay the purchase money to the plaintiffs.

From the judgment so rendered the defendants appealed.

Small, McLean & Rodman for plaintiffs.
Ward & Grimes for defendants.

BROGDEN, J. Drainage assessments unmatured or not due are not liens or encumbrances within the meaning of the law. They are "charges" attaching to the land, as they fall due from time to time and follow the land until all have been liquidated. Thus in *Taylor v. Commissioners,* 176 N. C., 217, this Court held: "The drainage tax becomes a lien, just as the benefits accrue, *i. e.,* annually. . . . It is a lien *in rem,* accruing annually and resting upon the land into whosoever hands it may be at that time." So, also, in *Pate v. Banks,* 178 N. C., p. 141, the Court said: "The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land and accrues, *pari passu* with the benefits as they shall accrue thereafter. They are not liens until they successively fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time. These assessments are to be levied from time to time to pay, not the indebtedness of the owner of any tract, but to pay the bonded indebtedness of the district. In that they are exactly like bonds issued by the township, county, or State for public benefits and which become liens on property in future only to the extent of the taxes falling due each year to pay the interest and such part of the principal as may become due. One who purchases land in a township, county or State cannot complain that these successive tax liens will from time to time be collectible out of his realty. Whether he knew of the existence of such indebtedness or not makes no difference. They are not encumbrances within the sense of the warranty clause of a deed."

The language above quoted was approved in *Comrs. v. Sparks,* 179 N. C., 581, and in *Foil v. Drainage Comrs.,* 192 N. C., 652.

The defendants rely upon C. S., 5371. The decisions in *Pate v. Banks* and *Foil v. Drainage Comrs., supra,* were rendered after the enactment of C. S., 5371. The decisions and the statute are not necessarily in conflict as contended for by the defendants. C. S., 5371, provides in substance that a purchaser for value without notice under a deed of general warranty, who pays to the sheriff "the amount of said drainage assessment, which is a lien on the land purchased," shall have a right of action against the warrantor of his title.

The agreed statement of facts in the case at bar does not disclose that the defendants are innocent purchasers for value or that they have paid any assessment upon the land purchased. An assessment matured and due, under the decisions, would constitute "a lien on the land purchased," but, as we view it, this statute does not refer to future assessments not due at the time the land was purchased.

We are therefore of the opinion that under the agreement of the parties as presented in the record that installments maturing and payable 1 September, 1928, and thereafter, do not now constitute a lien or encumbrance upon the timber, and the judgment of the trial court is

Affirmed.

JAMES B. LLOYD AND FRANK B. LLOYD v. W. L. SPEIGHT AND S. E. SPEIGHT.

(Filed 22 February, 1928.)

Reformation of Instruments—Degree of Proof Required—Equity—Mutual Mistake.

Equity will not reform a deed for the mutual mistake of the parties, or the mistake of one superinduced by the fraud of the other unless the party seeking this relief establishes the same by clear, strong, and convincing proof.

CONNOR, J., did not sit.

APPEAL by plaintiffs from *Nunn, J.*, at April Term, 1927, of EDGECOMBE. Affirmed.

Gilliam & Bond for plaintiffs.
George M. Fountain and Henry C. Bourne for defendants.

CLARKSON, J. Since the institution of this action S. E. Speight has died and the land in controversy has passed and vested in the defendant, W. L. Speight, by the terms of the will of S. E. Speight.

The question involved: Plaintiffs contend that they introduced evidence tending to show that certain conveyances from them to defendants, same being sufficient in form to pass a fee-simple title, were executed in pursuance of prior oral agreement whereby plaintiffs, being ignorant or mistaken with respect to their title and laboring under the mistaken belief that they were seized only of life estates, contracted to convey their rights in certain lands to defendant, or his agent; that defendant either shared in this mistaken belief as to plaintiff's title or knowing their true title fraudulently concealed said fact and induced plaintiffs to continue in such mistaken belief and to convey their interest in said property at a grossly inadequate price; that in law and in fact plaintiffs were seized of a fee-simple title to a large portion of the lands conveyed and of a defeasible fee to the balance. On this evidence plaintiffs prayed for a reformation of said instruments and upon motion were nonsuited. The correctness of this ruling is the only question involved.

Defendants contend: The plaintiffs in their complaint allege that the four deeds executed by them, one to W. L. Speight and the other three to S. E. Speight, whom they allege was the trustee or the agent of W. L. Speight, were either executed under a mistake of the grantors and grantees, or through a mistake of the grantors induced by the fraudulent representation of the grantees.

The will of Sarah E. Lloyd, under which plaintiffs claimed title, was construed in *Winslow v. Speight,* 187 N. C., p. 248, decision filed 27 February, 1924. The present action was commenced 3 July, 1925.

In *Allen v. R. R.,* 171 N. C., p. 342, citing numerous authorities, it is held: "To correct a deed on account of mistake is a recognized subject of equitable jurisdiction, but in order to its exercise for the purpose of reforming the instrument because it does not properly express the agreement of the parties, it is established that the mistake must be mutual or it must be the mistake of one superinduced by the fraud of the other."

In *Sills v. Ford,* 171 N. C., p. 738, it is held that "'Equity will correct a mistake, either as to fact or law, made by a draftsman of a conveyance or other instrument which does not fulfill or which violates the manifest intention of the parties to the agreement.' (*Leitensdorfer v. Delphy,* 15 Mo., 137.) And the denial of one of the parties that there was any mistake will not defeat the equity, but it depends altogether upon the finding of the jury from the pertinent evidence, which is of a clear, satisfactory, and convincing character, that a mistake was made in expressing the real agreement." *Lee v. Brotherhood,* 191 N. C., 359; *Crawford v. Willoughby,* 192 N. C., 269.

The general and accepted rule is that the proof must be clear, strong and convincing. *Glenn v. Glenn,* 169 N. C., 729; *Johnson v. Johnson,* 172 N. C., 530; *Long v. Guaranty Co.,* 178 N. C., 503.

Four deeds were made (1) acknowledged 18 June, 1910, and duly registered 20 June, 1910; (2) made and executed 28 November, 1921, and registered 29 November, 1921; (3) April, 1922, and registered 23, August, 1922; (4) April, 1922, and registered 29 November, 1922.

From a careful examination of the evidence of plaintiffs, which we do not think necessary to analyze, we are of the opinion that it was not sufficient to be submitted to the jury and the ruling of the court below, sustaining defendants' motion for judgment as in case of nonsuit at the close of plaintiffs' evidence, correct. C. S., 567. The judgment of the court below is

Affirmed.

CONNOR, J., did not sit.

WOOD PRIVOTT, ADMINISTRATOR OF JACKSON WRIGHT, v. ANDREW WRIGHT, LESSIE WRIGHT, AND JOSEPH WRIGHT.

(Filed 22 February, 1928.)

1. **Descent and Distribution—Nature of Property—Conversion and Reconversion—Equity.**

   The surplus going to the estate of a deceased mortgagor after a foreclosure sale of a mortgage on lands is regarded in equity as lands, descendible to his heirs at law.

2. **Executors and Administrators—Collection and Management of Estate in General.**

   After the foreclosure sale of a mortgage on lands of a deceased mortgagor, his executor or administrator is entitled to the surplus arising to his estate as his equity of redemption until it can be ascertained by him, under the regulations of the statute, whether it will become necessary for use in the payment of the debts of the deceased.

3. **Same.**

   Where moneys in the hands of the clerk of the court is to be regarded as realty belonging to the heirs at law, the administrator of the deceased is not authorized by law to a judgment to recover it as assets belonging to the estate, when it appears that he is not proceeding against the heirs as such, but seeks only to recover the fund as personal property belonging to the estate.

APPEAL by plaintiff from *Moore, Special Judge,* at July Term, 1927, of CHOWAN. Reversed.

W. S. Privott for plaintiff.
W. D. Pruden for defendants.

ADAMS, J. The record consists of the complaint, the answer, and the judgment, and upon these the merits of the appeal must be determined. Some of the plaintiff's allegations are admitted; some are denied. There is no verdict, no agreed statement, no finding of facts apart from recitals in the judgment. If the allegations in the complaint and in the answer are admitted the following circumstances may be regarded as established. On 10 January, 1914, Jackson Wright and his wife executed and delivered to C. S. Vann a mortgage on ten acres of land to secure a debt, the amount of which is not given. The plaintiff qualified as administrator of Jackson Wright on 18 February, 1921, but the date of the intestate's death does not appear. On 6 February, 1922, the mortgagee sold the land under the power conferred by the mortgage and executed a deed therefor to the purchaser. After applying a part of the proceeds to the payment of the mortgage debt he held as a surplus the sum of $558.50. The intestate left surviving him his widow and seven children, three of whom, Andrew, Lessie, and Joseph, the defendants, were under the age of twenty-one years. A portion of the surplus was paid to the widow as the cash value of her dower interest in the intestate's land, and a proportionate part of the remainder was paid respectively to the four children who were of age and to the clerk of the Superior Court for the benefit of the defendants who were minors. The interest of the minors ($183.83) is still in the hands of the clerk, and the object of the proceeding is to subject this fund to the payment of the intestate's debts. The defense is twofold: the bar of the statute of limitations, and the plaintiff's failure to observe the provisions of secs. 59 and 60 of the Consolidated Statutes.

In regard to the latter defense the plaintiff's manifest purpose is, not to proceed against all the heirs at law as successors to the intestate's land under the sections just cited, but to subject as equitable real estate, to the payment of the intestate's debts, that part of the surplus remaining in the hands of the clerk. "All the cases recognize the doctrine that the surplus is equitable real estate and should go to the persons who would be entitled to the equity of redemption. They differ as to the mode in which the parties in interest shall obtain their rights, rather than as to the rights themselves. One reason why the administrator should be entitled to recover is, that if the equity of redemption had not been sold it would have remained subject to the debts of the deceased, and might have been sold under a license to the administrator, if required for that purpose; and therefore the administrator should take the surplus and hold it until it is certain that it will not be required for the payment of debts." 3 Jones on Mortgages, 7 ed., sec. 1931. The plaintiff's position raises a question which upon a more complete disclosure of the facts, especially in reference to the deposit with the clerk, may demand consideration under the doctrine enunciated in *Hinton v. Whitehurst,* 71 N. C., 66; *ibid.,* 73 N. C., 157; *ibid.,* 75 N. C., 178; *Lilly v. Wooley,* 94 N. C., 412; 3 Jones on Mortgages, 7 ed., sec. 1931. See, also, *Scull v. Jernigan,* 22 N. C., 144; *Dudley v. Winfield,* 45 N. C., 91; *McLean v. Leitch,* 152 N. C., 266.

There was error in dismissing the action as in case of nonsuit and directing payment to the defendants of the funds in the hands of the clerk.

The statute of limitations is pleaded in bar, but the record does not show when the intestate died, when the debt was contracted, or any of the material facts upon which the alleged indebtedness or the plea of the statute is made to rest. If it is adjudged that the action is barred the other questions will become academic. The judgment is

Reversed.

J. H. SMITH v. PAGE TRUST COMPANY.

(Filed 22 February, 1928.)

Usury—Evidence—Parol Evidence.

In an action to recover the amount of usury alleged to have been charged in a transaction for which the plaintiff has given his note reciting that the maker was justly indebted in the principal sum named, it may be shown by a parol contemporaneous agreement, as not coming within the statute of frauds, that the payee was to sell the note at an amount less than therein stated for the maker, and that he himself received no part of the discount that would bring him within the intent and meaning of the usury charge complained of.

CIVIL ACTION, before *Daniels, J.,* at October Term, 1927, of NASH.

The plaintiff alleged and offered evidence tending to prove that on or about 1 April, 1920, he applied to the defendant for a loan of $13,000, the notes evidencing same to be secured by a deed of trust upon his land, and that the defendant through its president, J. R. Page, informed him that it had plenty of money and would make the loan. Thereupon the plaintiff executed and delivered to the defendant thirteen bonds for $1,000 each, and secured the payment thereof by a deed of trust upon his land. The deed of trust was made by the plaintiff and his wife as parties of the first part to Thomas B. Wilder, party of the second part, trustee, and Page Trust Company, party of the third part. Thomas B. Wilder was attorney for the defendant trust company. The deed of trust recited that the parties of the first part "are justly indebted to said Page Trust Company for money borrowed in the sum of $13,000, for which the said J. H. Smith has executed and delivered to said Page Trust Company thirteen bonds of even date with this deed in the sum of $1,000 each." Thereafter $11,700 was placed to the credit of the plaintiff. Plaintiff contends that he was charged a bonus of $1,300 for making this loan, and that such charge constituted usury. The defendant alleged and offered evidence tending to prove that at the time plaintiff made application for the loan he was informed that the defendant had no money to make the loan and that it would take the notes or bonds executed by plaintiff and sell said securities to the best advantage, guaranteeing that said sale would yield an amount equal to ninety cents on the dollar for said bonds. That in accordance with such agreement the defendant received the bonds from the plaintiff, and thereupon sold them to Page and Company at ninety cents on the dollar, which aggregated $1,300 discount, and that Page and Company, a partnership, resold the bonds to the Virginia Trust Company for ninety-six cents, and that the defendant had not received any profit whatever on the transaction.

The plaintiff contended that the president of Page Trust Company, a corporation, was a partner in Page and Company, which was a partnership; that practically all of the capital stock of Page Trust Company was owned by members of the Page family, and that the partners constituting the partnership of Page and Company were practically the identical persons who owned the stock of the corporation, and that therefore Page and Company, the partnership, in selling said bonds of plaintiff, was a mere dummy for the purpose of evading the usury law, and that the purported sale of the bonds by the Page Trust Company to Page and Company was a scheme and device for the collection of usury.

The following issues were submitted to the jury:

1. Did defendant, the Page Trust Company, knowingly take, receive, reserve or charge J. H. Smith a greater rate of interest than six per centum, as alleged in the complaint?

2. What amount of penalty, if any, is plaintiff entitled to recover of the defendant for usurious interest paid?

The jury answered the first issue No, and did not answer the second issue.

Upon the verdict as rendered there was judgment for the defendant and the plaintiff appealed.

Gatling, Morris & Parker for plaintiff.
Cooley & Bone for defendant.

Brogden, J. The plaintiff insists that evidence of the defendant to the effect that it received said bonds for the purpose of reselling them to the best advantage, was not competent, for the reason that it contradicted the express language of the deed of trust which recited that "the said parties of the first part are justly indebted to said Page Trust Company for money borrowed in the sum of $13,000, for which the said J. H. Smith has executed and delivered to said Page Trust Company thirteen bonds of even date with this deed in the sum of $1,000 each." We hold the evidence competent. The principle of law applicable was stated in *Bank v. Winslow,* 193 N. C., 470, as follows: "And in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, it was held that when a promissory note is given, payable in money, parol evidence may be received tending to establish as a part of the contract a contemporaneous agreement that a different method of payment should be accepted."

So that, in the case at bar there was evidence tending to show a contemporaneous agreement between the parties that the defendant should not pay to the plaintiff the money specified in the bonds and deed of trust, but that the defendant was authorized to sell said bonds at a discount of not more than ten per cent for the use and benefit of the plaintiff.

It is now thoroughly established that the usury law cannot be evaded by any cloak, device or subterfuge, but the trial judge instructed the jury fully and accurately upon every phase of the case, and the jury has accepted the defendant's version of the transaction, and the judgment upon said verdict is affirmed.

No error.

GEORGE C. WOOD v. H. N. HUGHES, H. C. PRIVOTT, AND MAJOR & LOOMIS COMPANY, INC.

(Filed 22 February, 1928.)

Action—Ground and Condition Precedent—"Real Controversy."

To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court.

APPEAL by defendant, Major & Loomis Company, Inc., from *Midyette, J.,* at December Term, 1927, of CHOWAN.

Special proceeding to establish the dividing line between the lands of plaintiff and H. N. Hughes, adjoining landowners.

From a verdict and judgment in accordance with plaintiff's contention, the defendant, Major & Loomis Company, appeals, assigning errors.

Ehringhaus & Hall and W. D. Pruden for plaintiff.
Whedbee & Whedbee for defendant, Major & Loomis Co.

STACY, C. J. Plaintiff brings this special proceeding, under chapter 9 of the Consolidated Statutes, to establish the dividing line between his land and an adjoining tract of land owned by H. N. Hughes. He alleges that the boundary line between the two tracts is in dispute; that the defendant, Hughes, has mortgaged his land to H. C. Privott; and that he has sold the timber thereon to Major & Loomis Company, both defendants herein.

The defendant, H. N. Hughes, filed answer; denied the existence of any controversy as to the boundary line; and alleged that whatever dispute may have existed was amicably adjusted by agreement between the parties on 6 August, 1925. The defendant, Major & Loomis Company, answered by saying that it had no knowledge or information as to the matters alleged in the petition; pleaded the settlement between plaintiff and Hughes as a bar to the present proceeding; and set forth that no controversy exists between it and the petitioner, save perhaps a question of trespass.

On the hearing it appeared that after the institution of the present proceeding, and before trial, H. C. Wood, had bought from H. N. Hughes his land; that he had paid off the mortgage held by H. C. Privott; and that a voluntary nonsuit as to both Hughes and Prevott had been taken before the clerk. Whereupon, the defendant, Major & Loomis Company, moved to dismiss the proceeding, first, because no question of boundary between it and the petitioner is raised by the pleadings, and, second, because the proceeding is not an appropriate one for trying the title to timber trees.

Without deciding whether the lines of a boundary of timber may be determined in a proceeding like the present, suffice it to say that no question of boundary as between the plaintiff and Major & Loomis Company seems to be raised by the pleadings. True, it is alleged and admitted that Major & Loomis Company is the owner of certain timber on the Hughes tract of land, but it is not alleged that the establishment of the line between the lands formerly owned by these adjacent landowners would settle any dispute between the petitioner and the appealing defendant. So far as now appears, the question seems to be academic. For this reason, we think the defendant's motion to dismiss the proceeding should have been allowed.

The discussion in *Lumber Co. v. Comrs.,* 173 N. C., 117, 91 S. E., 714, 845, might not prove uninteresting, if we were called upon to decide the appropriateness of the proceeding to try the title to timber trees. See, also, *Austin v. Brown,* 191 N. C., 624, 132 S. E., 661.

Reversed.

W. J. TRAFTON ET AL. v. E. A. FLORA.

(Filed 22 February, 1928.)

1. **Wills — Construction — Nature of Estates and Interests Created — Contingent Remainders.**

When a testatrix devises certain lands to M. in fee, and bequeaths certain bank stock to W. with limitation over in the event he die without heirs "his share" to the children of the brother of the testatrix, and by codicil "everything I have given M. to be given W. at her death": *Held,* the words "his share," in the bequest to W. refers to the identified shares of bank stock bequeathed to him and not to the real estate devised to M., in which he has a contingent remainder under the codicil to the will.

2. **Deeds—Titles—Fee Simple.**

The life tenant and the contingent remainderman may convey by valid deed the full fee-simple title to the lands so held by them.

CIVIL ACTION, before *Barnhill, J.,* at January Term, 1928, of PASQUOTANK.

Sallie A. Perry died leaving a last will and testament and devising "my home on Fearing and Pool streets." W. J. Trafton and Margaret Hill Trafton, his wife, and William Hill Trafton, unmarried, and of age, have contracted and agreed to sell the defendant the said lot of land for the sum of $10,000, and have tendered a deed for said property to the defendant. The defendant declines and refuses to accept said deed or to pay the purchase price upon the ground that the plaintiffs under the will of Sallie A. Perry are not owners of an indefeasible fee in said property. The trial judge decreed that the plaintiffs were the owners of said property in fee and that the defendant would receive a good title to said property. From the judgment so entered the defendant appealed.

Ehringhaus & Hall for plaintiffs.
Aydlett & Simpson for defendant.

BROGDEN, J. Testatrix devised in fee her homeplace on Fearing and Pool streets to plaintiff, Margaret Hill Trafton. Thereafter in a subsequent clause of the will she bequeathed to her nephew, William H. Trafton, five shares of the capital stock of the Carolina Banking and Trust Company. In a subsequent clause of the will it is declared: "If my nephew, William H. Trafton, dies without heirs, his share will go to my brother's children, Margaret, Evelyn, Helen, James and David Hill." In a codicil to the will occurs the following provision: "And everything I have given my sister, Margaret Hill Trafton, to be given to my nephew, William Hill Trafton, at her death."

It is to be observed in the outset that in the original will no interest whatever in the land in controversy was devised to William H. Trafton. The only property bequeathed to him was certain shares of stock. Hence the words "his share will go to my brother's children, Margaret," etc., must obviously refer to the identical shares of stock so specified, and do not relate to real estate or affect the title thereto. The only interest in real estate devised to William H. Trafton is created by the clause in the codicil above referred to. This clause devises in express terms a life estate in the real property in controversy to plaintiff, Margaret Hill Trafton, with the remainder in fee to William H. Trafton. Therefore it is clear that a deed executed by Margaret Hill Trafton and her husband, William H. Trafton, will convey a fee-simple title to said property. The judgment of the trial court is

Affirmed.

IN RE THE ESTATE OF DAMON BULLOCK.

(Filed 22 February, 1928.)

Descent and Distribution — Persons Entitled — Illegitimate Children — Canons of Descent.

An illegitimate child may not inherit as heir at law from her deceased grandfather, dying intestate, through her legitimate mother who predeceased him, under our canons of descent. C. S., 140; 137, clauses 4 and 5.

APPEAL by petitioner from *Daniels, J.*, at Chambers in Tarboro, 16 November, 1927, from EDGECOMBE.

Special proceeding to determine the proper distribution of certain funds, personal property, paid into the office of the clerk of the Superior Court of Edgecombe County, under authority of C. S., 148, as the residue of the estate of Damon Bullock, deceased.

The petitioner, Lynn Bullock, is the illegitimate son of Corinne Bullock who was the daughter of Damon Bullock, the intestate whose estate, amounting to $1,265.74, is now being settled, and who died 26 March, 1926, leaving neither widow nor child or children him surviving. Corinne Bullock predeceased her father; and Alex Bullock, Albert Bullock and Susan Perry are respectively brothers and sisters of the intestate.

From a judgment distributing the estate among the brothers and sister of the intestate, and excluding the petitioner from any participation therein, the petitioner appeals, assigning error.

A. A. Bunn and J. H. Bridgers for petitioner.
Perry & Kittrell for respondent.

STACY, C. J. Can an illegitimate child legally represent its deceased mother, under C. S., 140 and C. S., 137, clauses 4 and 5, and thus share in the distribution of its mother's father's estate? We think not. Such was the holding in *Waggoner v. Miller,* 26 N. C., 480 (June Term, 1844), and there has been no sufficient change in the statute law since that time to warrant a reversal of this decision.

True, it is provided by C. S., 140, that every illegitimate child of a mother dying intestate shall be considered among her next of kin, and as such shall be entitled to share in her personal estate; and, further, that illegitimate children, born of the same mother, shall be considered legitimate as among themselves, but this is as far as the statute goes. Had the mother of petitioner survived her father, and thus acquired a vested interest in his estate, there would have been no difficulty. But the mother, having predeceased the intestate, never became the owner of any part of his estate, hence, under the law, as now written, the illegitimate child is not entitled to share in the property in question. See *Wilson v. Wilson,* 189 N. C., 85, 126 S. E., 181; *Wallace v. Wallace,* 181 N. C., 158, 106 S. E., 501; *In re Mericlo,* 63 N. Y., Practice Reports, 62.

The case of *Skinner v. Wynne,* 55 N. C., 41, cited by appellant, is not in point, as the children there in question were legitimate and took from their grandfather "in their own right."

Affirmed.

DILL-CRAMER-TRUITT CORPORATION v. D. W. DOWNS.

(Filed 22 February, 1928.)

Ejectment—Presumption of Title Out of State—Appeal and Error—Trials—Instructions.

In an action of ejectment involving title to lands, where the State is not a party, other than in trials of protested entries, etc., title is conclusively presumed to be out of the State, and it is error for the trial judge to instruct the jury that the burden of proof is on the plaintiff to show this in addition to sufficient adverse possession to ripen the title in himself. C. S., 426, 428, 430.

APPEAL by plaintiff from *Moore, Special Judge,* at October Special Term, 1927, of EDGECOMBE.

Civil action in ejectment and to enjoin the defendant from cutting timber on a certain tract of land described in the complaint.

From a verdict and judgment in favor of defendant the plaintiff appeals, assigning errors.

Henry C. Bourne for plaintiff.
George M. Fountain for defendant.

STACY, C. J. There are at least two exceptive assignments of error appearing on the record which make it necessary to remand the cause for another hearing.

The court instructed the jury, *inter alia,* that in the present action the burden was on the plaintiff to show (1) title out of the State, and (2) adverse possession for seven years under color, or for twenty-one years without color. These instructions, as given, were erroneous.

In actions involving title to real property, where the State is not a party, other than in trials of protested entries laid for the purpose of obtaining grants, the title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so. C. S., 426; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627; *Pennell v. Brookshire,* 193 N. C., 73, 136 S. E., 257.

And in actions between individual litigants, as here, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. C. S., 428 and 430; *Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646; *S. c.,* 194 N. C., 231.

For the errors, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

GEORGE FINCH AND DOAK FINCH, EXECUTORS OF BROWN FINCH, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 22 February, 1928.)

1. **Negligence—Question for Jury—Railroads—Proximate Cause.**

In an action to recover damages from a railroad company for the negligent killing of plaintiff's testate at a grade crossing of the railroad with a much used street of a city, when there was evidence tending to show that defendant's long freight train had blocked the street and had been broken to clear the street for traffic, and that the testate, probably regarding this as an invitation, immediately went upon the tracks, when his view was obstructed by the cars of the freight train on either side, without looking or listening, and was struck by defendant's passenger train on a parallel track, coming without signal or warning; with further evidence that other employees of the defendant on the freight train could have perceived his danger and have warned him in time: *Held,* the question of negligence and contributory negligence was for the jury under instructions as to whether the defendant's negligence was the proximate cause of the injury, or the testate's negligence proximately contributed thereto, under the rule of the prudent man.

2. Same—"Invitation to Cross."

Where there is evidence tending to show that the plaintiff's testate failed to look and listen for trains before attempting to drive across the tracks of defendant railroad company, at a much used grade crossing with a city street, and was struck by defendant's train, under circumstances tending to show defendant's negligence, and its invitation for the testate to cross that would have excused his own negligence, the question is one for the jury under proper instructions from the court.

3. Pleadings—Proof and Variance—Error—Reversible Error.

In an action against a railroad company to recover damages for the negligent killing of plaintiff's testate, while he was attempting to drive across its tracks in an automobile at a grade crossing with a frequented street of a city, there was evidence tending to show that the testate failed to look and listen for an approaching train that caused the accident resulting in death, with allegation in the complaint of specific facts that would excuse his not having done so: *Held*, the admission of vague evidence, and instruction thereon of a specific and additional fact not alleged in the complaint, bearing upon the issue of contributory negligence in the plaintiff's favor, is a variance between allegations and proof that constitutes reversible error.

4. Motions to Nonsuit—Evidence Considered in Light Most Favorable to Plaintiff.

Upon a motion as of nonsuit the evidence is to be taken in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom.

APPEAL by defendant from *Oglesby, J.*, and a jury, at February Term, 1927, of DAVIDSON. New trial.

This is an action brought by plaintiffs, executors of Brown Finch, against the North Carolina Railroad Company. The summons was served on defendant corporation 20 November, 1925. The complaint alleges that Brown Finch died in Davidson County, N. C., on 28 March, 1925. That he left a will naming plaintiffs executors, and they have duly qualified and entered upon the discharge of their duties. That the defendant is a corporation, chartered, organized and existing under the laws of the State of North Carolina, the owner of the railroad from Goldsboro to Charlotte, N. C., which runs through Thomasville in Davidson County, N. C. It has a franchise and has a right as a common carrier to operate and run trains with locomotive engines to carry freight and passengers. It was the owner of the railroad and franchise when plaintiffs' testate was killed. That the Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia and engaged in the operation of a railroad with trains and engines over the track of the defendant company, through the city of Thomasville, by virtue of a lease from defendant.

That on 28 March, 1925, the said Brown Finch, plaintiffs' testator, was traveling along one of the main streets of the city of Thomasville in his Buick automobile about 8:25 o'clock a.m.; on the said date turned (to travel) along and over a public crossing from the street on the south side of the said railroad to the street on the north side of the said railroad, in the western part of said city in front of West End Store, which crossing is a grade crossing and a very much used street or crossing, without any gates or watchman stationed there, or other signals; that at the time the said Brown Finch approached the said crossing, there was standing across the said crossing a long freight train headed towards the north, and extending a great distance to the north and south of the said crossing, and the said Brown Finch stopped his car, when he approached the crossing and waited for the street or crossing to be cleared by the train. Other persons likewise waited the clearing of the crossing; that after waiting for quite a while an employee and one of the crew in charge of the said freight train, and as plaintiffs are informed and believe, the conductor of said freight train, came to this crossing where the said Brown Finch and others had stopped and were waiting the clearing of the crossing, cut the train in two at the crossing and signalled those in charge of the movement of the train to move up the front part, the engine being then up near the station in the city of Thomasville, and a very great distance from the crossing, and the train was moved so as to clear the crossing, said freight train being all the time on the south track of the said railroad; that as soon as the crossing was cleared, and while the employee and member of the crew of said train in charge thereof, was still standing at the said crossing or near thereto, and in plain view of the said Brown Finch and others, the said Brown Finch and other persons who had waited the clearing of the track at the crossing immediately started to go across the track, and as the said Brown Finch was passing over the said crossing, and as the front of his car got onto the north track of the said railroad, a passenger train of the Southern Railway Company, lessee of the defendant as aforesaid, coming south at a great speed and without any signal or warning whatsoever, ran into the car which was driven by the said Brown Finch, with great force, knocked the car over against the box cars left standing when the train was parted as aforesaid, crushed the said car of the said Brown Finch between the passenger train and box cars, utterly demolishing the said automobile and killing the said Brown Finch. The freight train referred to was the train of the Southern Railway Company, lessee of the defendant, and in charge of its employees. That the said Southern Railway Company, lessee of the defendant, as aforesaid, on the said

28 March, 1925, negligently and carelessly opened up the said crossing for persons to go over the same at a time when its fast train, train No. 37, was approaching said crossing, and negligently and carelessly ran the said train No. 37 through the city of Thomasville at a great and dangerous and unnecessary rate of speed, and negligently and carelessly failed to give any signals or warning of approach to the said crossing, at which crossing it had negligently and carelessly failed to have any gates, watchman or other signals of the approaching train, and at a time when the approach of train No. 37 could not be seen by persons at the crossing on the south side where the said Brown Finch was, by reason of the fact of the long freight train extending north therefrom to a great distance, and at a time when the employee of the said Southern Railway Company, lessee of the defendant as aforesaid, who had cut the freight train apart to make an opening for persons to cross the said railroad track, was still present, and knew of the movements of the said Brown Finch, and should have known of the approach of said train No. 37, which was going south, and notwithstanding the said crossing had been cleared and the said employee was present at the crossing, no warning or notice was given of the approach of said train No. 37, and by reason of the said negligent acts the plaintiffs' testator, Brown Finch, was killed, and his car demolished; that the said Brown Finch at the time of his death was 32 years of age, in sound health and full of vigor, mental and physical, highly educated and an experienced and capable business man, making at least $30,000 per year, and the automobile that was demolished was worth $2,000. Wherefore, plaintiffs demand judgment against the defendant for the sums of (1) $250,000 damages for the wrongful death of their testator; (2) $2,000 for the destruction of the automobile.

The defendant denies the material allegations of the complaint, and for a further answer to the plaintiffs' complaint says:

"That on 28 March, 1925, the Southern Railway Company, as lessee of the North Carolina Railroad, was operating a freight train between the towns of Spencer and Greensboro, North Carolina; that when said freight train reached the town of Thomasville, North Carolina, it stopped for the purpose of making repairs to the engine before moving north; said train was on the northbound track at the time of the accident complained of; that after standing for about ten minutes working on the engine, the defendant's conductor cut the train so as to make an opening at the street crossing. In the meantime, the plaintiffs' testator drove up on the street and stopped his car within a few feet of the freight train, and that as soon as said freight train was parted, and before the wheels of said train had stopped moving, and before the street was cleared, the plaintiff's testator negligently and carelessly dashed between the cars over the main line of the defendant's railroad, where he was stricken by defendant's southbound train; that both plaintiffs' testator and defendant's conductor were standing near the crossing on the same side of the freight train and plaintiffs' testator dashed in between the cars just as soon as the space was wide enough for his automobile to get through, without looking or listening, and before the defendant's conductor could give any signal whatsoever to him; that had the plaintiffs' testator remained stationary in his car until defendant's conductor could move his train, the accident would not have happened, but plaintiff's testator carelessly and negligently and recklessly, without either looking or listening for the approach of a train or waiting for a signal from the conductor, rushed his automobile between the cars on to the track before defendant's conductor had any chance whatsoever to give him warning, and the injuries sustained by the plaintiff's testator were due to his own contributory negligence; that said conductor, as well as other persons, tried to stop plaintiff's testator by signal and by calling to him, but that testator without paying any regard to his safety, carelessly and negligently rushed through the opening without paying any attention whatsoever to warnings and without looking and listening for the approach of a train, rushed on to the main line immediately in front of a southbound train, and was fatally injured; and the defendant avers that plaintiffs' testator contributed to his own fatal injury as hereinabove set out."

The facts tended to show: "That on 28 March, 1925, defendant's lessee stopped one of its northbound freight trains at Thomasville, N. C., for the purpose of making repairs to the engine before going further north; that the said freight train was on the northbound track at the time plaintiffs' testate was killed; that, after standing about fifteen (15) minutes, the defendant's conductor cut the train so as to make an opening at the street crossing; that defendant's railroad tracks run through Thomasville, N. C., north and south; that West End Store is in the western section of Thomasville, about sixty or sixty-five feet from the railroad crossing; that there is a street crossing the railroad connecting North and South Main streets near this store. There are two main streets in Thomasville, one on the north side, the other on the south side of defendant's tracks, and parallel therewith. There are connecting streets crossing defendant's tracks—three west of the station, including the West End crossing.

At the time plaintiffs' testate was killed there were no gates, watchmen or signals at West End crossing, which was about three-quarters (¾) of a mile south of the station. The engine of defendant's freight train stopped near the station and extended probably ten cars south of the West End crossing. While defendant's freight train was blocking the crossing, plaintiffs' testator traveled in a closed car from the north end of Thomasville parallel with defendant's railroad track and defendant's freight train aforesaid standing thereon. As he approached the crossing, which was then blocked by defendant's freight train, he drove around a truck loaded with chairs which was standing at the crossing and stopped his automobile about six or eight feet from the railroad track. Other persons were at the crossing waiting for the crossing to be cleared. Some two or three minutes after plaintiffs' testator reached said crossing and stopped, the conductor uncoupled the freight train and caused the engine to move north a sufficient distance to clear the crossing, leaving about ten cars south of the crossing, the balance of the train, which reached near the station (which was three-quarters of a mile away), being north of the crossing. The conductor followed the moving portion of the freight train across the crossing, walking slowly behind it and on the side of the track."

Rev. O. B. Williams, witness for plaintiffs, testified in part: "Brown Finch saluted me, and I understood from his gestures he extended to me an invitation to ride across with him. *Finch's car was entirely closed; neither of us could hear the other.* I put my hand on the fender of his car and told him I was going to get my car on the other side. Finch's car was standing still headed toward the train. In two or three minutes the trainmen came from the rear of the train, took hold of the lever and signalled to the engineer to move forward. The train would not uncouple, and he signalled again, and the train moved slowly backward and seemed to release, and he lifted the coupling and signalled again, and the train moved forward and cleared the crossing. The trainmen followed the train across the crossing, walked slowly behind the train, and on the side of the track and when the train cleared the crossing, *the trainmen gave a different signal from the one he gave when the train moves to clear the track.* Brown Finch and I moved toward the southbound track. I was moving cautiously and, as I looked when I stepped over there on the southbound track, I saw a fast train approaching at a close range, and I felt danger and said, '*Look out for the train!*' and I ran for my life. There were two explosions close together. Brown Finch was killed and his car was completely demolished." On cross-examination: "The conductor of the freight train signalled the engineer forward and made several signals before they got the cars uncoupled. The conductor moved along with the moving train at the end of the last car and on the same side of the train that I was on. I think he walked at the end of the train and had his hand on the rear of the car until the train stopped. *I do not know the stop signal, but the conductor made a signal.* I cannot say whether it was the customary signal for stopping. The conductor was looking forward towards his engine until the train stopped, *and he was looking in that same direction when he gave the signal.* . . . About the moment the freight cars stopped rolling, or immediately thereafter, we started across the tracks. The opening was wide enough for two cars to pass. I had one foot on the southbound track when I looked to the right and saw that train No. 37 was coming. . . . I only had a momentary vision of the train and turned my back and got away as quickly as possible."

Thomas Kennedy, witness for plaintiffs, testified in part: "Trainmen then flagged the engineer of the freight train and the engineer loosened the train and pulled a part of it across the crossing. The last time I saw the conductor he was standing there doing this (here witness indicates a signal). I took it that we could go across. I began to start my truck, and Brown Finch was three or four feet ahead of me when I started. I could not move as fast as Brown Finch could, and I stopped, thinking he was going to cut across in front of me. I moved along slowly across the crossing, and I saw a train within ten feet of us. This train struck Brown Finch's car, demolishing it and killing him." On cross-examination he testified: "When I first saw the trainman or conductor he was walking up by the side of his train about ten or twelve feet from the crossing and on our side of the train. He was walking toward the engine. He reached in between the cars and put his hand on the lever. I saw him give a signal to the engineer to slack up. As soon as the train was slack, the conductor cut it in two. I did not see the conductor give the signal to pull forward, but I did see him give a signal after the cars started moving. *This is the signal to which I referred in my direct examination. When this conductor was giving this signal he was looking right up the train towards the engineer.* I do not know what this signal was, whether it was to stop or not, but I recall that I have seen exactly the same signal given in the switch yard when cars were shifting."

Plaintiffs' evidence further tended to show that plaintiffs' testator was killed by a fast passenger train of defendant's lessee approaching from the north on a track parallel with the track on which the freight train was passing and within four or five feet of it; that said passenger train was running rapidly, possibly sixty miles an hour; that it gave no signal whatever of its approach; that the vision of the plaintiffs' testator was obstructed by the freight train; that said passenger train was rapidly approaching said crossing without giving any signal or warning; that those who were waiting at the crossing to pass at the same time plaintiffs' testator was waiting did not hear the approach of the passenger train until it came to the crossing—heard no signal. The freight train obstructed the view of the approaching train.

The evidence tended to show that West End crossing was a much used crossing; that it was within the corporate limits of the town of Thomasville; that from 500 to 1,000 people passed over it daily; that the population of Thomasville in 1925 was about 7,500 people.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the death of plaintiffs' testate, Brown Finch, caused by the negligence of the Southern Railway Company, lessee of the North Carolina Railroad Company, as alleged in the complaint? Answer: Yes.

"2. Did the said Brown Finch by his own negligence contribute to his death, as alleged in the answer? Answer: No.

"3. What amount of damages, if any, are the plaintiffs entitled to recover for the death of Brown Finch? Answer: $140,000.

"4. What amount of damages, if any, are the plaintiffs entitled to recover for the destruction of the automobile, as alleged in the complaint? Answer: $1,500."

The other necessary facts and material assignments of error will be set forth in the opinion.

Raper & Raper, Phillips & Bower, McCrary & DeLapp, and King, Sapp & King for plaintiffs.

Linn & Linn, Sidney S. Alderman, Walser & Walser, Z. I. Walser, W. F. Brinkley and P. V. Critcher for defendant.

CLARKSON, J. The defendant introduced no evidence, and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit (C. S., 567), which motion the court below overruled. In this we think there was no error. On motion for nonsuit the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The court below charged the jury clearly and accurately the law in regard to the burden of proof, negligence, proximate cause and contributory negligence.

The court charged: "That both the railroad in approaching a public crossing and the traveler on the highway, are charged with mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty. Our Supreme Court has laid down certain other rules of conduct of travelers in approaching railroad crossings, which rules the Court gives you for your guidance in determining and passing upon this action. A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen, and to ascertain whether a train is approaching; and the mere omission of the trainman to give the ordinary or statutory signals will not relieve him of this duty. Where the view is unobstructed, a traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when by doing so he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. Where the view is obstructed a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing, because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. There may be certain qualifying facts and conditions which so complicated the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety. The court further instructs that it is the duty of the employees of a railroad company to give reasonable and timely notice of the approach of trains to a public crossing by ringing the bell or blowing the whistle of the locomotive when the circumstances demand it. The court further instructs you that in considering the degree of care exercised by defendant, you may consider the speed of the train, the acts of the employees, the nature of the crossing, whether or not there were gates or automatic bells there with other circumstances in the case. The court charges you that it was lawful and proper for the conductor to separate his train so as to cease blocking the crossing, and the mere fact that he separated the train would not constitute negligence; as to whether it would constitute an invitation for deceased to go upon the crossing is a matter for the jury to decide; it is a matter for you to consider in passing upon the acts of the defendant, and in determining whether or not defendant was negligent. If you find by the greater weight of the testimony that the defendant failed to keep a proper lookout, and failed to exercise a degree of diligence under the circumstances as you find them in this case, such as a prudent man would have exercised, and such failure was the proximate cause of the injury, you will answer the first issue Yes."

This charge embodies the correct principles of law and is fully borne out by decisions of this State. *Johnson v. R. R.*, 163 N. C., 431; *Brown v. R. R.*, 171 N. C., 266; *Goff v. R. R.*, 179 N. C., 216; *Dudley v. R. R.*, 180 N. C., 34; *Perry v. R. R.*, *ibid.*, p. 290; *Blum v. R. R.*, 187 N. C., 640; *Rigsbee v. R. R.*, 190 N. C., 231; *Barber v. R. R.*, 193 N. C., 691.

A portion of the above charge contended by defendant not pertinent to the facts in the present action will be hereafter considered.

In *Harrison v. R. R.*, 194 N. C., p. 656, the facts were different from the present action.

On the question of contributory negligence the court below instructed the jury as follows: "The court, gentlemen, instructs you that it is a rule of law that a person who voluntarily goes on a railroad track at a point where there is an unobstructed view of the track, and fails to look or listen for danger, cannot recover for an injury which may have been avoided by looking and listening; but where the view is obstructed or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury. These circumstances may involve obstructions on the tracks, several tracks and trains running on them in different directions, and one train is obscured by another. When these facts exist, gentlemen, the issue of contributory negligence is for you to determine under the instructions given you by the court and the facts as you find them. The court further instructs you, gentlemen, that if you should find that the trainmen's act in cutting the train in two parts, and opening the crossing, would be an implied invitation for deceased to cross, and that deceased, being familiar with the crossing, he might act within reasonable limits on the presumption that it is safe for him to go on the crossing. The extent to which a traveler may rely on such circumstances is a question of fact, and while ordinarily the same degree of care and vigilance is not required of a traveler, under such circumstances, as otherwise, he has no right to rely exclusively upon such circumstances, nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinarily prudent man would use under like circumstances." The charge embodies correct principles of law. *Barber v. R. R., supra,* and cases cited.

The serious assignment of error is the refusal of the court below to give the following special instruction, which the defendant prayed the court to give: "I charge you that you cannot consider any contention that the conductor of the freight train was negligent in *giving a hand signal to plaintiffs' testator, signalling him to come upon the crossing at which he was killed,* because no such negligence is alleged and charged in the complaint. You will, therefore, disregard any such contention in passing upon the first issue." The defendant contends that "the defendant was absolutely entitled to have this special instruction to eliminate from the case a contention as to negligence not supported by the complaint. It will be observed that the complaint specifies four distinct elements of alleged negligence: (1) Opening up the crossing at a time when the fast train was approaching; (2) ran No. 37 (Crescent Limited) through the town at a great and dangerous and unnecessary speed; (3) failed to give any signals or warning of its approach to the crossing; (4) failed to have any gates, watchman or other signals at the crossing; but contains no allegation that the freight conductor was careless or negligent in giving an express affirmative signal to plaintiffs' testator. . . . Accordingly it appears beyond dispute that this second signal was given by the conductor looking straight down the train toward the engine and was plainly and manifestly a signal to the engine crew of the freight train, and was the signal which stopped the movement of the forward part of the freight train. Even if it had been alleged that an express hand signal was negligently given by this conductor to Brown Finch and the others, this proof would not have sustained the allegation. Certainly in the absence of the allegation the court should have expressly eliminated the theory of a negligent express hand signal as an invitation." We think this prayer should have been given. It is termed in defendant's brief *express invitation by hand signal.* If there was evidence of an express invitation by hand signal, under the facts and circumstances of this case, the plaintiffs' testator could have, perhaps, relied on the express invitation. This express invitation by hand signal was not alleged in the complaint. No amendment to the pleading was requested by plaintiffs.

The Superior Court or this Court, in its discretion, had a right to allow the amendment. *Deligny v. Furniture Co.,* 170 N. C., 189. The *Deligny case* is cited by plaintiffs, but the Court in that case said (at p. 198): "The predominant idea of the present code system is to try the cases on their real merits. It is broad in its scope and amply sufficient, as it now is, to administer justice, in every possible case, without regard to form or technical accuracy, and is sufficient, as it is at present, and even without any amendment, to satisfy the most advanced notions of modern pleadings and procedure. *But we think that the judge has, by the instruction we have quoted, neutralized, if not entirely cut out, all of the defendant's objections which are based upon its supposed duty to use the metal cleat,* and the case need only be further considered upon *the other exceptions."* (Italics ours.)

In the *Deligny case,* conceding that no amendment was necessary, or it is in the discretion of the court to grant or refuse an amendment, it will be noted that the charge of the court neutralized and cut out the objections. In this action the charge was refused, although the evidence in regard to the hand signal was vague, uncertain and ambiguous, as will hereafter be noted.

How about the facts bearing on the express invitation by hand signal? The court in its charge, reciting plaintiffs' contention, said: "The plaintiffs say that on the morning of 28 March, 1925, there was a freight train across the West End crossing of the Southern Railway in Thomasville; that the train was across the crossing about fifteen minutes, and that there were no gates or watchman at the crossing; that while the freight train was standing across the crossing Brown Finch, the deceased, drove up in a Buick sedan and stopped, waiting at the crossing with others for a few minutes; that he drove up alongside a truck loaded with chairs, and that he stopped his car about eight feet from the track; that a member of the train crew uncoupled the cars and cut the train in two; that part of the train passed across the crossing, trainmen following it; *that trainman signalled; that signal understood to mean to cross;* that deceased, Williams and Kennedy started to cross, and that car driven by deceased was struck, knocked against the side of the freight train, demolished and deceased was killed." In the charge heretofore quoted, the court below said: "There may be certain qualifying facts and conditions which so complicated the question of contributory negligence that it becomes one for the jury, *even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by a watchman and the traveler enters on the crossing* reasonably relying on the assurance of safety." Although a correct principle of law, was it pertinent to the facts in this action? The exceptional instances, "signals given by a watchman." It is undisputed on the record that the street crossing had no gates or watchman. The signal in the charge which the court mentioned which would relieve plaintiffs' testator of the duty altogether to look or listen if a signal at all was given, it was contended by plaintiffs to have been given by the trainman (conductor).

This attitude of the charge practically left it to the jury to say that if the trainman (conductor) signalled, that signal was understood to mean to cross, and plaintiffs' testate reasonably relying upon the assurance of safety need not look or listen. In other words, the signal relied on by plaintiffs' testate was negligence and the contributory negligence issue was immaterial. When the court charged on the attitude of the trainman's (conductor) act *in cutting the train in two parts,* it charged: "The extent to which a traveler may rely on such circumstances is a question of fact, and while ordinarily the same degree of care and vigilance is not required of a traveler, under such circumstances, as otherwise, he has no right to rely exclusively upon such circumstances, nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinarily prudent man would use under like circumstances." This is a correct statement under the *Barber case, supra.*

But what is the evidence *"that trainman signalled, that signal was understood to mean to cross."* Plaintiffs' witness, Williams, testified:

"Finch's car was entirely closed, neither of us could hear the other. . . . The trainman followed the train across the crossing, walked slowly behind the train, and on the side of the track, and when the train cleared the crossing the trainman gave a different signal from the one he gave when the train moved to clear the track. . . . (On cross-examination): The conductor of the freight train signalled the engineer forward and made several signals before they got the cars uncoupled. The conductor moved along with the moving train at the end of the last car and on the same side of the train that I was on. I think he walked at the end of the train and had his hand on the rear of the car until the train stopped. I do not know the stop signal, but the conductor made a signal. I cannot say whether or not it was the customary signal for stopping. *The conductor was looking forward towards the engine until the train stopped, and he was looking in that same direction when he gave the signals."*

The witness, Kennedy, testified: "The trainman then flagged the engineer of the freight train, and the engineer loosened the train and pulled a part of it across the crossing. The last time I saw the conductor he was standing there doing this (here witness indicates a signal). I took it that we could go across. . . . I did not see the conductor give the engineer the signal to pull forward, but I did see him give a signal after the cars started moving. *This is the signal to which I referred in my direct examination. When this conductor was giving this signal he was looking right up the train towards the engineer. I do not know what this signal was, whether it was a stop signal or not, but I recall that I have seen exactly the same signal given in the switch yard when cars were shifting."*

The evidence in relation to the trainman's (conductor) signal, was to say the least vague, uncertain and ambiguous. Then again, did plaintiffs' testate see the signal and rely on it? The evidence *was that his car was entirely closed.* There was no allegation in the complaint that plaintiffs' testate relied on an express invitation by hand signal for plaintiffs' testate to cross. The evidence tends strongly to show that the signal was given to the engineer and not to plaintiffs' testate; at any rate the evidence of such a signal was vague, uncertain and ambiguous, and there is no evidence that plaintiffs' testate saw it or was misled by it.

There are other exceptions on the record not necessary to be considered. From a careful review of the whole record we think the prayer for instruction should have been given and the refusal, under the facts and circumstances of this case, prejudicial and reversible error. For the reasons given there must be a

New trial.

MRS. CORNIE WHITE ABBITT v. W. N. GREGORY AND THE DAVISON CHEMICAL COMPANY.

(Filed 22 February, 1928.)

1. **Removal of Causes—Power to Remove—Effect of Erroneous Judgment For Removal—Judgments—Status of Erroneous Judgment.**

An order of the clerk of the Superior Court, having jurisdiction of a motion to remove a cause from the State to the Federal Court for diversity of citizenship under the provisions of 3 C. S., 913(b), that the cause be removed as prayed by the defendants, meeting the requirements of the Federal statutes relating thereto, and made in apt time, is not void, and when improperly made is erroneous.

2. **Judgments — Setting Aside for Surprise, Excusable Neglect, etc. — Grounds Therefor—Judgment by Default and Inquiry—Removal of Causes.**

Where a cause has been remanded to the State from the Federal Court by the latter court, and the clerk of the former court has had entered, without notice to defendant, a judgment by default and inquiry for the want of an answer, pending the disposition of the cause in the Federal Court, and the order of remand has been regularly made, upon motion of the plaintiff's attorney, the judge of the Superior Court of the State having jurisdiction may set aside the judgment by default and inquiry upon the ground of mistake, inadvertence, surprise, or excusable neglect, upon the showing of a meritorious defense. C. S., 600.

3. **Judgments — Setting Aside for Surprise, Excusable Neglect, etc. — Requisites for.**

In order for the trial judge to set aside a judgment of the clerk of court, for default of an answer, C. S., 600, the judgment in question must be a valid one, and regularly entered.

4. **Removal of Causes—Effect of Removal—Further Proceedings in State Court — Judgments — Setting Aside for Excusable Neglect, etc. — Grounds Therefor.**

Where the clerk of the State court has erroneously granted defendant's motion to remove a cause from the State to the Federal Court on the ground of diversity of citizenship under the provisions of the Federal Removal Act, the moving defendants may assume that no further proceedings be had in the State court until the cause has been remanded from the Federal Court, and where a judgment by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys, upon relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendant to file answer will not be disturbed on appeal.

5. **Appeal and Error—Review—Questions of Fact and Findings on Appeal from Order of Removal.**

Where there are no exceptions to the evidence introduced, and the facts found thereon are conclusive on appeal to the Supreme Court, and the judge's conclusions of law are alone reviewable on appeal from an order setting aside a judgment on the grounds of the defendants' mistake, surprise, or excusable neglect. C. S., 600.

6. Appearance — What Constitutes General Appearance — Service — Acceptance of Service—Judgments in Rem, in Personam.

Where attachment proceedings in an action against nonresident defendants have been made against their property situate in this State in order to confer jurisdiction on our court, and the defendant has moved here for setting aside a judgment against him for surprise, mistake, excusable neglect, etc., it is a general appearance in our courts, and a submission to their jurisdiction, and a waiver of service of summons, and a judgment rendered in the action against them is not restricted to a judgment *in rem*, but is also one *in personam.*

APPEAL by plaintiff from judgment of *Midyette, J.*, rendered as of 12 November, 1927. From PERQUIMANS. Affirmed.

Motion by defendants that judgment by default and inquiry signed by the clerk of the Superior Court of Perquimans County in this action in favor of plaintiff and against defendants, on 26 September, 1927, be set aside and vacated, and that defendants have leave to file answers to the complaint of plaintiff, filed on 12 July, 1927.

From judgment upon the facts found by the judge, setting aside and vacating the judgment by default and inquiry, and directing that defendants be allowed to file answers, in accordance with their motion, plaintiff appealed to the Supreme Court, assigning error based upon her exception to the judgment.

Battle & Winslow, Wilcox, Cooke & Wilcox, Ehringhaus & Hall and McMullan & LeRoy for plaintiff.

Garnet, Taylor & Edwards and L. I. Moore for defendant, Gregory.

Jesse N. Bowen and Stephen C. Bragaw for defendant, The Davison Chemical Company.

CONNOR, J. Plaintiff prays judgment in this action that she recover of defendants the sum of $30,888, or some other large sum. She alleges as her cause of action that defendants jointly and collusively committed a fraud upon her with respect to the sale of certain shares of stock of the Eastern Cotton Oil Company, which she had formerly owned, and which she had sold to the defendant, The Davison Chemical Company upon the solicitation of defendant W. N. Gregory. She alleges that said sale was procured by means of certain false and fraudulent representations made to her as a stockholder of said Oil Company, by defendant Gregory, general manager and director thereof, acting therein in his own behalf and in behalf of his codefendant. She alleges that these false and fraudulent representations were made with respect to the price which the defendant Chemical Company had offered and was willing to pay for said shares of stock, and with respect to the true value of the same at the time of the sale.

The action was begun by summons issued by the clerk of the Superior Court of Perquimans County on 25 May, 1927. The original summons was returned by the sheriff of said county, endorsed as follows: "Received 25 May, 1927. Defendants not to be found in my county." Thereupon summons in the action, and warrant of attachment, to be levied upon property of defendants, situate within the State of North Carolina, were duly served by publication. Both the summons and the warrant of attachment were returnable before the clerk of the Superior Court of Perquimans County on 2 July, 1927. Before the return day, to wit, on 27 June, 1927, an order was entered by said clerk extending the time within which plaintiff was required to file her complaint to 1 August, 1927. On said return day attorneys for defendants entered a special appearance, and moved that the action be dismissed for that no complaint had been filed therein. Defendants excepted to the court's denial of this motion.

The complaint was thereafter filed on 12 July, 1927. It is alleged therein that plaintiff is a resident of the city of Norfolk, in the State of Virginia; that defendant, W. N. Gregory, is also a resident of the city of Norfolk, in the State of Virginia, and that the defendant, The Davison Chemical Company, is a corporation organized under the laws of the State of Maryland, with its principal office in the city of Baltimore, in said State.

On 18 July, 1927, after notice to plaintiff, service of which was accepted by her attorneys on 7 July, 1927, Stephen C. Bragaw, an attorney at law, duly licensed and practicing in the courts of this State, entered a special appearance in the action then pending in the Superior Court of Perquimans County, for the defendant, The Davison Chemical Company, and thereupon filed its petition, accompanied by bond as required by statute, praying that said court "proceed no further herein except to make an order of removal" from said court to the District Court of the United States for the Eastern District of North Carolina, "as required by law, and that the clerk of this court be directed to make up or cause to be made up a transcript of the record herein to be lodged in the District Court of the United States for the Eastern District of North Carolina, Elizabeth City Division, as provided by law." With respect to the citizenship or residence of the parties to the action, it is alleged in said petition that plaintiff was at the time of the commencement of this action and is now a citizen of the State of Virginia, residing in the city of Norfolk; that the defendant, The Davison Chemical Company, is not a citizen of the State of North Carolina, but was at the time of the commencement of this action, and is now a foreign corporation organized and existing under the laws of the State of Maryland, with its principal office in the city of Baltimore, in said State; and that the codefendant of petitioner, W. N. Gregory, is not a citizen of the State of North Carolina, but was at the time of the commencement of the action, and is now a citizen of the State of Virginia, residing in the city of Norfolk, in said State. One of the attorneys for defendant, W. N. Gregory, was advised of the filing of said petition and concurred in the motion of attorney for his codefendant for the removal of the action from the State court to the Federal Court for trial. At the hearing of the motion for removal upon the petition, the clerk of the Superior Court, upon his finding from "the petition and from other papers in the cause" that petitioner was entitled to have the action removed from the State court to the Federal Court for trial, entered an order dated 18 July, 1927, removing the action from the State court to the Federal Court, and directing the clerk of the State court "to make and certify a transcript of the record in the action for transmission to the District Court of the United States for the Eastern District of North Carolina, Elizabeth City Division, forthwith." Plaintiff's exception to the overruling of his objection to said order of removal was entered by the clerk at the request of her attorneys. Plaintiff did not appeal from said order. Pursuant to said order of removal, the action was docketed in the District Court of the United States on 6 August, 1927. Thereafter, to wit, on 14 September, 1927, both defendants filed answers to the complaint in the District Court of the United States. No answer had been filed by either defendant in the State court.

On 1 September, 1927, attorneys for plaintiff caused a notice to be served on attorneys for defendants that she would apply to the judge of the District Court of the United States at the next term of said Court to be held at Elizabeth City, on 10 October, 1927, for an order remanding the action to the Superior Court of North Carolina for Perquimans County, upon the grounds set forth in the written motion filed in the office of the clerk of the District Court, a copy of which was attached to the notice served on attorneys for defendants. Upon the hearing of the motion to remand, before the Honorable Isaac M. Meekins, United States District Judge, on 10 October, 1927, it appeared to the Court "that the plaintiff and the defendant, W. N. Gregory, are both residents of the State of Virginia, and that there is no diversity of citizenship between the plaintiff and the defendants within the meaning of U. S. Code, Title 28, sec. 41, subsec. 1 (Jud. Code, sec. 24), and that therefore the District Court of the United States has no jurisdiction of the said controversy and the cause is not removable within the meaning of

U. S. Code, Title 28, sec. 71 (Jud. Code, sec. 28)." Order dated 10 October, 1927, was thereupon entered remanding the action to the Superior Court of Perquimans County. Pursuant to said order the clerk of the U. S. District Court, as he was directed therein to do, made out a certified copy of the motion to remand and of the order made upon said motion, together with the answers of the defendants filed in the United States District Court, and forwarded same to the clerk of the Superior Court of Perquimans County.

After notice of plaintiff's motion to remand had been served on attorneys for defendants, to wit, 1 September, 1927, and before said motion had been heard by the judge pursuant to said notice on 10 October, 1927, attorneys for plaintiff appeared before the clerk of the Superior Court of Perquimans County and moved for judgment by default and inquiry, upon the ground that defendants had not filed answers to the complaint in said court. This motion was granted, and the judgment by default and inquiry in favor of plaintiff and against defendants was signed by the clerk on 26 September, 1927. Neither of the defendants had notice, personally or through their attorneys of the motion for such judgment, nor did they know that such judgment had been signed until 31 October, 1927. At the time the judgment by default and inquiry was signed by the clerk of the Superior Court of the State, upon motion of plaintiff's attorneys, her motion, by her said attorneys, to remand the action from the Federal Court to the State court, of which notice had been given to attorneys for defendants, was pending in the Federal Court.

After the said action had been remanded from the Federal Court to the State court, and after due notice to plaintiff defendants, by their respective attorneys, appeared before the judge presiding at the Fall Term, 1927, of the Superior Court of Perquimans County, on 31 October, 1927, for the purpose of moving the court for leave to file answers to the complaint in said court. An examination of the record in the action then disclosed to attorneys for defendants, for the first time, that a judgment by default and inquiry had been signed by the clerk in this action on 26 September, 1927. Defendants thereupon moved in open court that said judgment by default and inquiry be set aside and vacated upon the ground (1) that the same was entered without notice, and was procured by the mistake, surprise, inadvertence and excusable neglect of defendants and their attorneys; (2) that said judgment was signed contrary to the usual and ordinary practice and procedure of the court and was therefore irregular; (3) that the clerk of the Superior Court was without jurisdiction to sign the said judgment on 26 September, 1927, while plaintiff's motion that the action be remanded from the Federal Court to the State court was pending in the Federal Court, and that same was therefore void; and (4) that the time for filing answers to the complaint had not expired on 26 September, 1927.

Upon the hearing of defendant's motion, which was resisted by plaintiff, the judge found the facts for the purpose of ruling thereon, from evidence offered by both plaintiff and defendants. There are no exceptions to these findings of fact, which are set out in full in the order and judgment. Upon the facts thus found, it was adjudged:

"1. That the defendant, W. N. Gregory, has not been guilty of any neglect with respect to the filing of his answer in this cause, and that such neglect, if any has occurred, was the neglect of his counsel, was excusable, and arose by inadvertence and mistake, and is not imputable to said defendant, Willis N. Gregory.

2. That the defendant, Davison Chemical Company, has not been guilty of any neglect with respect to the filing of its answer in this cause, and that such neglect, if any has occurred, was the neglect of its counsel, was excusable, and arose by inadvertence and mistake, and is not imputable to the said defendant, Davison Chemical Company.

3. That the said judgment herein attempted to be entered on 26 September, 1927, by H. G. Winslow, clerk of the Superior Court of Perquimans County, is irregular and contrary to the usual course and practice of the court, and was attempted to be entered for want of an answer when the time allowed by law of North Carolina for filing the answers had not expired, and when the cause had been regularly removed, and was pending in the United States District Court.

4. That the said judgment is void because the clerk of the Superior Court of Perquimans County was without jurisdiction to enter it at the time he so attempted."

It was, therefore, ordered and adjudged "in the court's discretion, that said judgment attempted to be entered by the said H. G. Winslow, clerk of the Superior Court of Perquimans County, on 26 September, 1927, be and the same is hereby set aside, vacated and declared void and of no effect."

It was further ordered and adjudged "in the discretion of the court, that defendants and each of them be allowed to file their answers in the above-entitled cause, and the clerk of the Superior Court of Perquimans County is directed to receive and file the same."

It was further ordered "that defendants, and each of them, be permitted to change the caption in the answers now filed with the clerk of the Superior Court of Perquimans County to show that the cause is pending in the Superior Court of Perquimans County, N. C., instead of in the District Court of the United States for the Eastern District of North Carolina, and that same shall be marked 'Duly Filed' by the clerk of the

Superior Court of Perquimans County upon the request of counsel for defendants at any time within twenty days from the date of this order."

To the judgment, signed by consent at Jackson, N. C., on 23 December, 1927, plaintiff duly excepted. Upon her appeal to this Court her only assignment of error is based upon this exception. There are no exceptions to the findings of fact, made by the judge, upon which he rendered the judgment. These findings of fact are, therefore, conclusive upon plaintiff's appeal to this Court. No contention is made by the plaintiff that there was no evidence to support the findings of fact; indeed, the material facts appear on the record and are not in controversy. In *Helderman v. Mills Co.,* 192 N. C., 626, it is said in the opinion for the Court: "There was evidence in support of the findings of fact. They are, therefore, conclusive upon the appeal of plaintiffs to this Court. Whether the conclusions from these facts, to wit, that defendant's neglect to file an answer within the time prescribed by law was excusable, and that defendant has a meritorious defense to plaintiff's cause of action as set out in the complaint, are correct, is a matter of law, and therefore reviewable upon appeal to this Court." *Lumber Co. v. Cottingham,* 173 N. C., 323; *Marion v. Tilley,* 119 N. C., 473; *Weil v. Woodard,* 104 N. C., 94.

Before considering plaintiff's contentions that there are errors in the conclusions of the judge, from the facts found by him, upon which the judgment was rendered, setting aside and vacating the judgment by default and inquiry, and that, therefore, the assignment of error based upon the exception to the judgment should be sustained, it may be well to say that it is not necessary now, in view of the subsequent record, to consider or determine the effect, if any, of the appearances entered in this action, prior to the date of the judgment by default and inquiry, by the respective attorneys for defendants, which were designated at the time by them as "Special Appearances." Subsequent to such appearances, each defendant has applied to the court to have a judgment in the action set aside, and for leave to file an answer to the complaint. They have each thereby entered a general appearance in the action, which for all purposes of jurisdiction is equivalent to personal service of summons. *Currie v. Mining Co.,* 157 N. C., 209. Both defendants, by filing answers to the complaint, pursuant to leave granted by order of the court, made upon their application, have become subject to the jurisdiction of the court to the same extent, and with the same effect as if summons had been personally served upon them. C. S., 490. The court's jurisdiction is no longer dependent upon the attachment nor will plaintiff's recovery, if any, be restricted to a judgment *in rem.* A judgment rendered in the action will be *in personam,* as well as *in rem,* with respect to each defendant.

In view of the conclusion by the judge, upon the facts found by him, in effect that the failure of defendants to file answers prior to the date of the judgment by default and inquiry, was not due to the neglect of defendants, but to the neglect, if any, of their respective attorneys, and that the neglect of the said attorneys to file said answers was excusable and in no event imputable to defendants, who have each a meritorious defense to the action, as disclosed by the answers of the defendants, filed in the Federal Court, after the order of removal had been signed by the clerk of the State court, and before the order remanding the action to the State court had been made by the judge of the United States District Court, it is not necessary for us to consider or to pass upon plaintiff's contentions, upon her appeal to this Court, that there was error in the other conclusions, upon which the judge ordered and adjudged that the judgment by default and inquiry, signed by the clerk on 26 September, 1927, be set aside and vacated, not only the ground of excusable neglect, but also upon the ground that said judgment was void, or at least irregular. If there was no error in the conclusion of the judge that the failure of defendants to file answers in the Superior Court, prior to the date of the judgment by default and inquiry, was due, not to their neglect, but to the neglect of their attorneys, which was excusable, and not imputable to defendants, plaintiff's assignments of error, upon her appeal to this Court, cannot be sustained, and the judgment must be affirmed. It is not required, in order that we may affirm the judgment from which plaintiff has appealed, that we sustain the conclusions of the judge, in accordance with the contentions of defendants, that the judgment by default and inquiry is void, or at least irregular. Although said judgment may be valid and regular in all respects, as contended by plaintiff, both below and here, the judge had the power, conferred by statute—C. S., 600—if the same was rendered by reason of the mistake, inadvertence, surprise or excusable neglect of defendants, or of their attorneys, to relieve defendants from said judgment, by vacating and setting same aside. In *Helderman v. Mills Co.,* 192 N. C., 626, it is said, in the opinion for the Court: "C. S., 600, is a highly remedial statute; the relief authorized by the statute ought not to be denied where, as in this case, plaintiff's rights, if any he has, cannot ultimately suffer, and defendant has a meritorious defense, which he seeks only an opportunity to make, and which he would, but for the statute lose through his mistake, inadvertence, surprise or excusable neglect." In order that relief may be had under the statute, the judgment from which a party seeks relief must be a valid judgment, and regular in all respects. If a party to an action, in which a valid judgment has been rendered, upon his motion in the cause that the same be set aside, sustains his allegation that the judgment was rendered because of either his mistake, inadvertence, surprise or excusable neglect, he may have such relief as the judge, in his discretion, may grant. Relief from a void or irregular judgment may be had, in proper cases, but not under C. S., 600.

Whether upon the facts found by the judge, in the instant case, the neglect of attorneys for defendants to file answers to the complaint, within the time required by statute, or whether, in any event, such neglect was imputable to defendants, are questions of law; the conclusions of the judge, with respect to these matters are, therefore, reviewable by this Court, upon plaintiff's appeal. The judge has concluded, in effect, from the facts found by him, that the failure of defendants to file answers, in the Superior Court prior to the date of the judgment by default and inquiry, was due to their excusable neglect, within the meaning of the statute. He, therefore, in the exercise of his discretion, granted defendants relief from the judgment by default and inquiry, as he is authorized to do by the statute.

The publication of summons and warrant of attachment in this action was begun on 25 May, 1927. Before the service by publication had been completed, and before the return day, both defendants employed attorneys to appear for and to represent them in this action. In addition to other attorneys, each defendant employed an attorney, residing in this State and duly licensed to practice in its courts. Both these resident attorneys undertook to go to Perquimans County and to appear there for defendants in this action, as well as in other actions against the defendants, involving the same matters as this action, brought by other persons as plaintiffs. Upon the return day of the summons both these resident attorneys appeared in the office of the clerk of the Superior Court of Perquimans County in behalf of defendants. Prior to this time attorneys employed by defendants had corresponded with attorneys of record for plaintiff in this action, with respect to the pleadings to be filed herein. Plaintiff and her attorneys, therefore, knew that defendants had employed attorneys to appear for and to represent them in this action, and that it was their purpose to defend the same. The answer of defendant Gregory appearing in the record was verified by him on 16 July, 1927; that of defendant, Davison Chemical Company, was verified on 9 September, 1927.

It cannot be said that defendants or either of them failed to give this case the attention which a prudent man gives to his important business. On the contrary, they did all that the law does or should require of a defendant. They employed counsel, learned in the law, and skillful and diligent in its practice, whose zeal and fidelity to the cause of a client are unquestioned. They verified their answers promptly when same had been prepared by their attorneys, and entrusted them to their attorneys for filing as required by law. Upon these and other facts found by the judge, it cannot be held that defendant's failure to file the answers, within the time required by law, was due to such negligence on their part as deprived the judge of power to grant them relief under the statute.

When the resident attorneys for defendant appeared in their behalf at the clerk's office, on the return day, they found that the clerk, without notice to them, or to defendants, and prior to such return day, upon motion of plaintiff, had extended the time for filing the complaint to 1 August, 1927. Thereafter, on 18 July, 1927, defendant Davison Chemical Company filed its petition before the clerk for the removal of the action from the State court to the Federal Court. Plaintiff's attorneys did not resist the motion for removal. The clerk had jurisdiction to receive the petition and to hear and pass upon the motion. 3 C. S., 913(b). When the order of removal was made, plaintiff's exception thereto was entered by the clerk, at the request of her attorneys. Plaintiff, however, did not appeal from said order, as she had the right to do under the statute. After the removal had been effected, plaintiff appeared in the District Court of the United States on 1 September, pursuant to notice to defendants, and lodged a motion in said court that the action be remanded to the State court. This motion pended in the District Court from 1 September to 10 October, when it was heard and allowed by the judge. The order of removal was erroneous, but it does not therefore follow that it was void. The distinction between an order or judgment which is void, and one which is merely erroneous, is clearly stated in *Duffer v. Brunson,* 188 N. C., 789. The order of removal in the instant case is more than the mere semblance of an order. The clerk had jurisdiction of the parties; the action was then pending in the Superior Court. He had jurisdiction of the petition by the express terms of the statute. His order therefore cannot be held void; it was merely erroneous. It was effective until reversed on appeal, or until the action had been remanded by the order of the judge of the United States District Court. Attorneys for defendants relied upon the order for their assurance that the clerk, having made it, and thereby surrendered jurisdiction of the action, would not undertake any further proceeding therein. Attorneys were justified in giving the action no further attention in the Superior Court, especially in view of the fact that plaintiff's attorneys thereafter invoked the jurisdiction of the Federal Court by their motion to remand. Their failure to file an answer to the complaint in the Superior Court, after the said court had surrendered jurisdiction of the action by removing same to the Federal Court, was at least excusable, even if it was negligent.

At the time this action was begun thirteen other actions were begun in the Superior Court of Perquimans County, all upon the same cause of action, against these defendants. The plaintiffs in these thirteen actions are all residents of the State of North Carolina—all members of either the White or Winslow families, who have long resided in Perquimans County. These families are and have been for many years prominent in the social and business life of Perquimans County. The plaintiff in this action is a member of the White family, but since her marriage has resided in the city of Norfolk in the State of Virginia, and not in Perquimans County, North Carolina. In the preparation of the petitioners for removal of such of the fourteen actions as involved sums in excess of $3,000, defendants' attorneys inadvertently failed to note the fact which distinguishes this case from others of the fourteen which were removed to the Federal Court. This distinction was not brought to the attention of defendants or of their attorneys until 10 October, 1927, when the motion to remand was heard in the United States District Court.

It is needless to consider the question discussed in the briefs, as to whether answers were filed in the Superior Court within the time allowed by statute. There is no error in the order allowing answers to be filed within the time fixed in said order. Nor is there error in the judgment setting aside and vacating the judgment by default and inquiry. The order and the judgment are

Affirmed.

W. O. HAMPTON ET AL. v. BOARD OF EDUCATION AND BOARD OF COUNTY COMMISSIONERS OF NEW HANOVER COUNTY.

(Filed 22 February, 1928.)

1. **Schools and School Districts—Contracts for Teachers' Salaries—Liability of County Commissioners—School Budget.**

When the board of trustees of a school district recommends public school teachers for the ensuing term of schools to the county superintendent of education, his contracts with teachers so recommended, made in accordance with the provisions of the statute relating thereto becomes a binding obligation upon the county commissioners when approved by it, and is in conformity with the budget of the county board of education, or when it is later approved by the county board of commissioners under the provisions of the statute. 3 C. S., 5533, 5605, 5572, 5571, 5559, 5561, 5516.

2. **Same.**

When there is one month for which the teachers of a school district have not been paid in accordance with their contracts of employment, and from the sum total of the approved budget of the board of education there remains a sufficiency to pay them, the board of county commissioners is liable for its payment, the statute not requiring the approval of the county commissioners for each separate item of the school budget.

3. Same—"Budgeting Forward."

Where the county board of education, by paying its teachers for a term of school have done so by nine monthly installments, for the calendar year, instead of by twelve installments, and in consequence the teachers have not been paid for three months of the year, a resolution of the board of county commissioners authorizing the county board of education in effect to pay them out of the allowance made by its budget for the year following is a "budgeting forward" approved by the board of county commissioners, and is binding upon the available funds accordingly, when the other requirements of the statutes on the subject are complied with. The provisions of chapter 277, Public Laws of 1927, have no application under the facts of this case.

ADAMS, J., concurring in result; STACY, C. J., dissenting.

CIVIL ACTION before *Devin, J.*, at October Term, 1927, of NEW HANOVER.

The plaintiffs are public school teachers of New Hanover County, and made contracts with the defendant board of education not later than April, 1926, for services for the year 1926-27. In accordance with such contracts plaintiffs were to render services beginning 15 September, 1926. Relying upon said contracts the plaintiffs entered upon the discharge of their duties on 15 September, 1926, and taught in the public schools of New Hanover County in the districts for which they were respectively employed for the full term of nine months, and each of plaintiffs has fully complied with all the terms and conditions prescribed in said contracts. Payments for said services have been made up to 15 May, 1927, but installments for salaries maturing 15 June, 15 July, 15 August, and 15 September, 1927, have not been paid, said installments aggregating $107,061.05.

There was judgment for the plaintiffs against both defendants, from which judgment the board of county commissioners of New Hanover County appealed.

Varser, Lawrence, Proctor & McIntyre for plaintiffs.

J. O. Carr for Board of Education.

Marsden Bellamy and Bryan & Campbell for Board of Commissioners for New Hanover County.

BROGDEN, J. Three questions of law are presented by the record:

1. What are the legal limitations upon the power to contract with teachers?

2. What are the legal essentials of a valid teacher's contract?

3. Are the contracts of plaintiffs and others similarly situated valid and enforceable?

(1) The limitations of liability of the county commissioners and counties with respect to debts contracted by boards of education are prescribed by statute and may be classified as follows:

(a) But if the county board of education shall wilfully create a debt that shall in any way cause the expense for the year to exceed the amount authorized in the budget without the approval of the county commissioners, the indebtedness shall not be a valid obligation of the county and the members of the board responsible for making the debt may be held liable for the same. 3 C. S., 5464.

(b) And no contract for teachers' salaries shall be made during any year to extend beyond the term of a majority of the committee, nor for more money than accrues to the credit of the district for the fiscal year during which the contract is made. 3 C. S., 5533.

(c) And the county commissioners, after 3 March, 1923, shall not be liable for any debt, other than loans from the State, incurred by the county board of education in excess of the amount set forth in the May budget, unless the making of the debt was approved by the county commissioners. 3 C. S., 5605.

From these provisions of the law it is obvious that the county commissioners are liable for all amounts set up in the budget by the board of education for the purposes prescribed therein, and, in addition, for such further expenditures as said board of commissioners may approve.

(2) A valid teachers' contract, imposing liability upon the county commissioners, must conform to the following statutory requirements:

(a) Teacher must be at least 18 years of age. 3 C. S., 5572.

(b) The teacher must be duly certified by the State Board of Education. 3 C. S., 5571.

(c) The contract must be signed by the county superintendent on the recommendation of the committee or board of trustees of the district in which they are to teach. 3 C. S., 5559.

(d) The salary fixed by the county board of education must be in accord with the authorized salary schedule. 3 C. S., 5561.

(e) The contract must show the salary allowed and be approved and signed by the county superintendent and copy filed with him. 3 C. S., 5516.

(f) By virtue of the limitations of liability heretofore stated the salary or amount of money specified in the contract must be included in the adopted budget or otherwise approved by the county commissioners.

(3) Considering the limitations prescribed by statute and the essentials of a valid contract, the question thereupon immediately arises: Are

the contracts of plaintiffs and other teachers similarly situated valid and enforceable? This is the vital point in the case, and the one about which the controversy centers and from which it radiates. It is the Verdun before which and around which the parties wage desperate battle.

In order to develop the principles of law applicable it is necessary to recur to the facts found by the trial judge. In 1920 the board of education adopted the plan of paying the salaries of teachers in twelve equal installments on the 15th of each month. The fiscal year began 1 July and ended 30 June. The teachers entered upon the performance of their duties on 15 September in each school year, and hence the first installment of salary became due on 15 October. The school term was nine months and the salaries of teachers were budgeted for the school term of nine months. It was clear that a budget of nine installments could not cover a payment of twelve installments. In this situation what could be done? Two courses only were open: First, to budget salaries to cover twelve months instead of nine, or twelve installments instead of nine; second, to overlap or consolidate the budget of one year with that of the succeeding year. The matter remained in this uncertain condition until 30 June, 1923, the end of the fiscal year. On that date there was an unexpended budget balance for schools amounting to $5,585.98. As we construe the record the budget for 1923-24, made in May, 1923, provided for the first installment of teachers' salaries to be paid 15 October, 1923, and thereafter on the 15th of each month for nine months, which date expired 15 June, 1924, which was the end of the school year. Therefore the July, August and September, 1924, salaries for teachers would be outside the May, 1923, budget, and also not included in the May, 1924, budget for the reason that the budget for teachers' salaries was based upon a school year of nine months and included only nine installments, beginning on 15 October in each year and expiring 15 June of the succeeding year. Thereupon on 30 June, 1923, the board of county commissioners adopted the following resolution: "It being understood that the teachers' salaries for July, August and September, 1924, are to be paid out of the 1924-25 budget." This resolution authorized and approved the overlapping or consolidation of the budget for the months specified, and this custom so established and approved remained in force up to the school year 1927-28. At this time the board of education refused to "budget forward" salaries for July, August and September upon the theory that these salaries constituted an indebtedness accruing prior to 1 July, 1927, within the purview of the County Finance Act of 1927.

In April, 1926, the plaintiffs made contracts with the board of education in accordance with the formalities prescribed by law for the year

1927-28. They entered upon the discharge of their duties on 15 September, 1926, and continued to render faithful and efficient service in full compliance with their contracts. They were paid up to and including installments maturing 15 May, 1927. The installments maturing on 15 June, July, August and September, 1927, have not been paid. These overdue and unpaid installments aggregate $107,061.05, for which sum this suit is brought against the board of education and the board of county commissioners. The total sued for is composed of two items: (a) June, 1927, salaries, amounting to $27,071.51, and (b) July, August and September, 1927, salaries, amounting to $79,989.54. The contracts with teachers for 1926-27 required a sum for teachers' salaries exceeding the amount specified in the budget for that purpose by over $27,000. Hence when the June salaries, amounting to $27,077.61, fell due on 15 June, there was no money with which to discharge the indebtedness.

The board of county commissioners contends that it is not liable for this item of June salaries for two reasons: (a) The law, 3 C. S., 5464, and 5606, provides that the commissioners shall not be liable in any sum in excess of that set forth in the May budget, unless they approve the contracting of the debt or debts in excess thereof. (b) That said board has not consented to the contracting of said debts in excess of the budget, but on the contrary, by resolution, has expressly refused to approve any excess. It appears that the board of commissioners on 7 July, 1924, approved a budget of $400,000 for the board of education, covering a period of twelve months beginning 1 July, 1924, and ending 30 June, 1925. But in said approval occurs this language: "And that this board will not in anywise be responsible for any excess expense of the board of education over the said revised budget of $400,000," etc. In July, 1926, when the board of county commissioners approved the budget, it adopted the foregoing resolution: "This board will not in anywise be responsible for any excess expense by the board of education beyond the said amount for $423,350, and this board requests the board of education to give its assurance that it will comply with this request."

Neither of these contentions is upheld. 3 C. S., 5559, provides that when the contract of a teacher is signed by the superintendent on the recommendation of a committee or board of trustees "it is a valid contract and the teacher is properly elected." In other words, the statute itself expressly directs and empowers the employment of teachers and expressly provides a schedule by which their salaries shall be determined. A teacher's salary, under such a contract, then becomes a debt under the law. The board of commissioners is not liable for any debt "in excess of the amount set forth in the May budget" unless the making of the debt was approved. It appears, however, that the total amount of teachers' salaries for the year 1926-27 set up in the May budget, was $307,468.50, and that contracts were actually made aggregating $333,870.30. The contracts so made were within the "amount set forth in the May budget," because the May budget "set forth the amount of $423,350." Of course, the contracts so made exceeded the particular item in the budget providing for teachers' salaries, but there are no words in the statute requiring the county commissioners to specifically and independently approve each item in the budget. Indeed, it appears from the exhibits filed that the minutes of the board of county commissioners do not show the details or items of the budgets for any year except 1926-27. 3 C. S., 5601, provides: "If the board of county commissioners shall approve the total amount of the budget, it shall levy sufficient returns, after deducting the amount to be received from the State, to produce the amount asked for in the budget," etc. If the contention of the board of commissioners should be correct, no teacher could afford to sign a contract until the budget was made and approved by the county commissioners. Then she would be compelled to wait until all contracts for all districts in the county had been duly filed with the county superintendent in accordance with the law. She would then be compelled to ascertain what salary every other teacher in the county was receiving and then after securing this total, she would then be compelled to go to the auditor's office or some other place and audit the budget in order to ascertain if her contract was included within the particular item appropriated for teachers' salaries. And after all this was done she could then sign her contract and leave a copy with the county superintendent. Even then, perhaps, she might be compelled to stand over the board of education with a club to prevent it from spending the money so appropriated for some other purpose in order to be certain that she did not work for nothing. Such a state of affairs, of course, would impose intolerable burdens upon the teachers. Frankly, it is conceded that various sections of the school law upon this subject are confusing, and the board of county commissioners, under the law as written, has strong justification for the contention made by it with reference to this aspect of the case.

With reference to the resolutions passed by the board of county commissioners notifying the board of education that the county would not be responsible for exceeding the budget, it appears that such resolutions had no reference to teachers' salaries, but to the totals only. But, however this may be, the trial judge finds as a fact that the board of county commissioners is indebted to the board of education in the sum of $40,651.91 "on account of funds which belong to the board of education as a matter of law and to which said board of education was entitled," etc. As this fund has never been appropriated to any specific purpose the board of education has the right to use it for any lawful purpose, and hence it could be used in paying June salaries, amounting to $27,071.51.

Now, with the June salaries disposed of, the question occurs as to the legal status of the July, August and September salaries. These salaries stand upon a different footing. The defendant contends that the resolution of the board of county commissioners of 30 June, 1923, meant and was intended to mean that the school year and fiscal year were to become coterminous and no more. But as we interpret the resolution, it undertook to approve a budget beyond the fiscal year, expiring 30 June, 1923, by appropriating out of the budget of the succeeding school year a sum sufficient to pay salaries for the months of July, August and September. By express terms the resolution recognized, approved and authorized the "budgeting forward" of teachers' salaries for the months specified. The defendant further contends that even though the said resolution recognized the principle of "budgeting forward," still the "budget would be the limit of liability without further action on the part of the commissioners." Upon its face this argument is built upon the rock of logic, but as the county commissioners approved the budget as presented and then consented to and authorized the board of education to "budget forward" salaries for the months specified, then of necessity this constituted "further action" by the board and was an amendment to the budget expressly increasing it by the amounts necessary to meet the salaries for July, August and September. So that, while the budget would still be the limit of liability, the term budget, under these circumstances, must be understood to mean the amended budget or consolidated budget, which included salaries for July, August and September. In other words, salaries for July, August and September, while they did not appear in the May budget presented by the board of education, they did appear in the amended or consolidated budget resulting from the said resolution of the county commissioners adopted 30 June, 1923, for the reason that the said board has expressly approved the indebtedness, by enlarging the budget so as to include such installments.

The defendant board of county commissioners asserts that the provisions of chapter 277, Public-Local Laws 1927, and the election held thereunder constitute a mandate forbidding the payment of the indebtedness in controversy. Said act in section 2 thereof, by express terms, referred to teachers' salaries in excess of the amount specified for that item in the budget. There is no language in the act which could be construed as covering salaries for July, August and September. Moreover, the act provided that its provisions should not become effective until approved by the majority of qualified voters of New Hanover County. A majority of the qualified voters did not approve the act authorizing the county commissioners to assume and pay the deficit created by the board of education. Hence this act disappears from the case. But notwithstanding the said act of 1927, if the indebtedness in controversy was valid and enforceable, and it had been duly incurred before the passage of the act, then the contractual rights of the plaintiffs could not be impaired thereby.

We hold therefore that the contracts of the plaintiffs were valid and enforceable. We hold further upon the findings of fact set out in the record that all of said indebtedness, including the said sum of $40,645.91, is a valid indebtedness of the board of commissioners of New Hanover County and that all of said indebtedness was incurred prior to the first day of July, 1927, and comes within the purview of section 8, subsection (j), chapter 81, Public Laws 1927.

Affirmed.

ADAMS, J. (concurring in result): While the questions involved are by no means free from difficulty, I have concluded after a close scrutiny of the record that upon the facts found by Judge Devin the judgment should be affirmed, although the reasons upon which my conclusion is founded differ in certain respects from some of those given in the opinion of the Court. The plaintiffs are entitled to the agreed value of their service based upon a valid contract, and to deny relief is to withhold a right. *Ubi jus ibi remedium*—there is no wrong without a remedy, for want of right and want of remedy are reciprocal.

STACY, C. J., dissenting: Desirable as it may be to award the plaintiffs judgment for their salaries—and such is quite desirable—I think the Court has departed from the law in order to do so on the present record. For this reason, I am compelled to dissent. No authority is cited, and none has been found, for overriding statutory provisions on an unsupported argument of *ab inconvenienti*. In this respect, the case is probably *sui generis*.

It is specified in 3 C. S., 5596, that the May budget, to be prepared by the county board of education, "shall provide for three separate school funds: (a) a salary fund; (b) an operating and equipment fund; and (c) a fund for the repayment of all notes, loans and bonds," with further provision as to what each fund shall contain.

Acting under authority of this section and in obedience to its command, the board of education of New Hanover County in the year 1926 duly submitted the following May budget for the school year 1926-1927:

DETAILED APPROVED BUDGET, 1926-1927.

Teachers' salaries	$307,468.50
Supt. and Asst. Supt., salary	9,375.00
Board of Education, per diem	408.00
Superintendent Public Welfare	1,200.00
Office expense, clerical and supplies	5,400.00
Salary and bond, Treasurer	1,430.00
Fuel, water and electric current	10,500.00
Janitors	15,000.00
Supplies	5,500.00
Insurance	3,184.00
Rents	1,200.00
Interest on short loans	7,500.00
Trucks and transportation	16,415.00
Repairs	8,500.00
Clerks	4,620.00
Jeans Sup.	390.00
County Demonstration Agent	400.00
Furniture and fixtures	1,000.00
Principal, State loans	11,850.00
Interest on State loans	11,259.50
Expense, Superintendent	750.00
Total	$423,350.00

This budget was approved by the commissioners, with admonition to the board of education that they would not be responsible for any expense in excess of the budget, the total amount of which has since been paid to the board of education.

3 C. S., 5605, provides: "And the county commissioners, after 3 March, 1923, shall not be liable for any debt other than loans from the State, incurred by the county board of education in excess of the amount set forth in the May budget, unless the making of the debt was approved by the county commissioners."

It is admitted that the contracts for teachers' salaries for the school year 1926-1927 were in excess of $307,468.50, the amount set forth in the budget for that purpose. But the court holds that by reason of the "budgeting forward" arrangement adopted in 1923, three years prior thereto, the action of the commissioners in approving the May, 1926, budget amounted in effect to amending the budget by adding a sum sufficient to cover teachers' salaries for the months of July, August and September, 1927, though not shown therein, and approving it as thus amended, notwithstanding the intervening admonitory resolution adopted by the commissioners in 1924, and repeated in substance in 1926. I do not think the record supports this conclusion.

It may be safely asserted that if the action of the commissioners had the effect of amending the budget and approving it for a much larger sum than that shown therein for teachers' salaries (not then known perhaps), neither the board of commissioners nor the board of education so understood it; for the record clearly discloses a studied effort on the part of the commissioners to confine the board of education, in its expenditures, to the amounts set out in the budgets.

Furthermore, if the contracts made for teachers' salaries were within the "amount set forth in the May budget," though in excess of the amount designated for that purpose, "because the May budget set forth the (total) amount of $423,350.00," as stated in the Court's opinion, does it not follow as a necessary corollary, if the same rule is to apply equally to other matters, that the limit to be expended for each item in the budget is the total amount of the sums designated for all the items enumerated therein? If so, the ultimate liability of the county, under such a budget, would be the sum total of all the amounts multiplied by the number of items in the budget. That is to say, the ultimate liability of New Hanover County, under the budget above set out, would be $423,350 for each item designated therein, or a total of $8,890,350 (plus whatever sum should be added under the doctrine of "amendment by budgeting forward"). This may be the law, but I cannot think so; nor is it to be assumed that the logic of the Court's opinion will be pursued beyond the exigencies of the present case.

The amount "set forth" in the budget with respect to any given item, as I understand it, means the amount designated therein for that particular purpose; otherwise, why should the May budget provide for three separate school funds? The amount set forth for teachers' salaries in the May budget, now under consideration, is $307,468.50, and not $423,350.00.

The plaintiffs may be entitled to recover, even as against the board of commissioners of New Hanover County, for which reason I think the case should be remanded for further findings. But, in my opinion, this right has not been made to appear on the present record. However, my views of the case have not prevailed, and as they are quite different from those expressed in the opinion of the Court, it would serve no useful purpose to write them out in a dissent. *Cui bono?*

I am glad the plaintiffs are to recover their salaries, as they ought to recover them, but I cannot approve the method adopted nor agree with the Court in its interpretation of the law. The same result might easily be accomplished on a fuller finding of facts, without dissent on the part of any one, but as a majority of the Court is satisfied with the present record, my concurrence is not needed.

WILLIS G. BRIGGS v. CITY OF RALEIGH ET AL.

(Filed 22 February, 1928.)

1. **Taxation—Constitutional Restrictions—Taxation for Public Purpose—Constitutional Law—Legislative Powers.**

   The Legislature is without Constitutional power to levy a tax or donate State property for any other than a public purpose, and the criterion for this question is whether the purpose aids the public through the prosperity of a class, or whether the public generally and directly will be helped.

2. **Same—Municipal Corporations—Bonds.**

   A municipality is without power to issue bonds or levy a tax for other than public municipal purposes.

3. **Same—State Fair.**

   Held, under the facts of this case, the donation of land by the Legislature for a State Fair is for a public purpose, and is constitutional.

4. **Same.**

   Held, under the facts of this case, the voting of bonds by a municipal corporation for the purpose of erecting buildings, etc., on land donated by the State, to be used for a State Fair to be operated within five miles of the municipality, is for a public municipal purpose, and is within the power of the city.

5. **Statutes—Construction—Presumption of Constitutionality—Taxation—Municipal Bonds.**

   Where the validity of a legislative act donating State lands, and the issuance of municipal bonds is in doubt, the doubt will be resolved in favor of the will of the people as expressed by the Legislature and the vote of the citizens to be taxed.

APPEAL by plaintiff from *Moore, Special Judge,* at Chambers, 5 December, 1927. From WAKE.

Controversy without action submitted on an agreed statement of facts, to determine the validity of certain proposed bonds of the city of Raleigh.

The Legislature at its last session, chapter 209, Public Laws 1927, dedicated and set apart two hundred acres of the State's land, situate within five miles of the State capitol, the particular acreage to be selected by the Governor and Council of State, for the purpose of holding annually a State Fair and Exposition, such as will properly represent the agricultural, manufacturing, industrial and other interests of the State: *Provided,* the city or citizens of Raleigh and the North Carolina Agricultural Society (C. S., 4936) donate not less than two hundred thousand dollars to be used in the erection of buildings, or proper development of the fair grounds, and the conducting of a fair thereon.

It is further provided in said act that the State Fair or Exposition so authorized shall be managed, operated and conducted by a board of directors consisting of one representative from each Congressional district in the State and three representatives from the State at large, such representatives to be appointed by the Governor, together with the following *ex officio* members of such board of directors: The Governor of North Carolina, *ex officio* chairman, Commissioner of Agriculture, President of the North Carolina State College of Agriculture and Engineering, the Director of the State Department of Conservation and Development, and the Mayor of the City of Raleigh.

At the same session of the Legislature, chapter 210, Private Laws 1927, the commissioners of the city of Raleigh were authorized and empowered, with the approval of a majority of the qualified voters of said city, to issue municipal bonds in a sum not to exceed $75,000, "and donate and contribute the proceeds of the same to the State for the purpose of assisting in the establishment and maintenance of a State Fair in the vicinity of Raleigh, under the conditions and provisions contained in chapter 209, Public Laws 1927."

A special election was duly called and held in the city of Raleigh on 26 July, 1927, at which said election a majority of the qualified voters, newly registered for said election (C. S., 2948), voted in favor of the issuance of the bonds to the amount of seventy-five thousand dollars.

From a judgment holding the bonds in question to be valid obligations of the city of Raleigh and denying the prayer for injunctive relief, the plaintiff appeals, assigning errors.

Barwick & Leach for plaintiff.
Clifton W. Beckwith and Albert L. Cox for defendants.

STACY, C. J. The primary rôle of municipal government is that of a protector of rights and not a giver of gifts, but if the end in view be a public municipal one, it is the general holding that a city may aid by donation, in proper instances, as well as by other means of assistance. *Cox v. Comrs.,* 146 N. C., 584, 60 S. E., 516; *Wood v. Oxford,* 97 N. C., 227, 2 S. E., 653. Albeit there can be no lawful tax which is not laid for a public purpose. *Loan Asso. v. Topeka,* 87 U. S., 655; *Comrs. v. State Treasurer,* 174 N. C., 141, 93 S. E., 482. "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State." *Jones v. City of Portland,* 245 U. S., 217. And in case of a city or municipality the tax, to be valid, must be for a city or municipal purpose, in a legal sense, as well as for a public one. Cooley on Taxation, Vol. I (4 ed.), sec. 126. That is, the objects to be attained must affect the people as a community and not merely as individuals. Cooley's Const. Limit., 531.

The appeal, therefore, presents two questions not heretofore decided in this jurisdiction: 1. Is a State Fair, such as described in the two statutes above mentioned, to be held annually under the supervision of the State, a public undertaking? 2. If so, is its location or retention within the vicinity of Raleigh, not more than five miles from the State capitol, a public municipal purpose for which a donation of $75,000 and more of public funds may be authorized by a favorable vote of a majority of the qualified voters of the city of Raleigh?

A negative answer to either one of these questions would require a reversal of the judgment, but if both are answered in the affirmative, it is conceded that the judgment should be upheld.

If we are to follow the clear weight of authority in other jurisdictions, where similar matters have been considered by the courts, the first question may readily be answered in the affirmative. Cooley on Taxation, Vol. I (4 ed.), sec. 203, and authorities there cited.

Speaking to the subject in *Kentucky Live Stock Breeders Association v. Hager,* 120 Ky., 125, 85 S. W., 738, where a legislative appropriation for a State Fair was upheld, *Hobson, C. J.,* delivering the opinion of the Court, said: "It is also insisted that a State Fair is not a public purpose for which the money of the State may be appropriated by the Legislature, and that the act merely gives a bounty of $15,000 to appellant. The appropriation to the World's Fair was sustained by this Court *(Norman v. Board of Managers,* 93 Ky., 537, 14 Ky. Law Rep., 529; 20 S. W., 901, 18 L. R. A., 556); and, if the Legislature may appropriate money in aid of a fair held in another State, to properly represent the State in such a fair, it is hard to see how a fair held within the State, to make an exhibit of the products of the State, is not equally a public purpose. Such legislation has been sustained by the current of authority in the other states of the Union having Constitutions substantially the same as ours. *(Daggett v. Colgan,* 92 Cal., 53, 28 Pac., 51, 14 L. R. A., 474, 27 Am. St. Rep., 95; *State v. Cornell* (Neb.), 74 N. W., 41, 39 L. R. A., 513, 68 Am. St. Rep., 629; *Sharpless v. Mayor of Philadelphia,* 21 Pa., 147, 59 Am. Dec., 759; *City of Minneapolis v. Janney* (Minn.), 90 N. W., 312; *Downing v. Indiana State Board of Agriculture,* 129 Ind., 443, 28 N. E., 123, 614, 12 L. R. A., 664; *Shelby County v. Tennessee Centennial Exposition* (Tenn.), 36 S. W., 694, 33 L. R. A., 717; *Bennington v. Park,* 50 Vt., 178.)"

The purpose and design of a State fair is to promote the general welfare of the people, advance their education in matters pertaining to agriculture and industry, increase their appreciation for the arts and the sciences, and bring them in closer touch with many things which otherwise might remain in reserve or "caviare to the general," to borrow an expressive phrase from Shakespeare's Hamlet.

The second question may likewise be answered in the affirmative, if we are to follow the general current of authority on the subject, though it is conceded that the decisions in this respect are variant. Note: L. R. A., 1917 E, 845.

Some diversity of opinion may well be expected in a matter of this kind, where the question presented, as it is here, is susceptible to more than one view. Indeed, the line which separates community interests from those that are nonmunicipal, especially where the latter result in benefit to the local public, is not always easy to plot. Quite the reverse. On this subject *Cooley, J.,* says: "Public and private interests are so commingled in many cases that it is difficult to determine which predominates; and the question whether the public interest is so distinct and clear as to justify taxation is often embarrassing to the Legislature, and not less so to the judiciary. All attempts to lay down general rules whereby the difficulties may be solved have seemed, when new and peculiar cases arose, only to add to the embarrassment instead of furnishing the means of extrication from it." Cooley on Taxation, Vol. I (4 ed.), sec. 175.

Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish them. *Waples v. Marrast,* 108 Tex., 5, 184 S. W., 180. However, the term "public purpose" is not to be construed too narrowly. *Weismer v. Village of Douglas,* 64 N. Y., 91. It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community. It may be for the inhabitants of a restricted locality, but the use and benefit must be in common, and not for particular persons, interests or estates. *Ross v. Davis,* 97 Ind., 83; *Coster v. Tidewater Co.,* 18 N. J. Eq., 68; *Soens v. City of Racine,* 10 Wis., 271.

Animadverting on the subject in *Town of Bennington v. Park et al.,* 50 Vt., 178, *Powers, J.,* delivering the opinion of the Court, well says:

"No formula has yet been devised by which to determine what is or is not a public use or purpose within the meaning of the constitutional prohibition; but it is clear that the ultimate advantage of the public as contradistinguished from that of the individual, is its characteristic feature. It is true that a proposed work may be of great utility to both the public and the individual, and still, according to circumstances, be either public or private in its character and quality. Men set up systems of government in order to subserve certain public ends, and reach advantages that could not otherwise be made available. The State is clothed with the trust of answering these ends. It is not to be limited to the mere duty of governing the people by the exercise of its police power, but it has a higher duty to promote, the educational interests of the people, encourage their industrial pursuits, develop its material resources, and foster its commercial interests, by providing all reasonable facilities demanded by a prudent regard for the growth, development, and general prosperity of a free people; and the State is not to be tied down to any narrow and merely utilitarian policy in promoting the prosperity of its citizens. The problem is not how little, but how much, can be done to elevate the people to the highest plane of material and political prosperity. Schools, colleges, charitable and reformatory institutions, institutions for the development of the arts and sciences, roads, bridges, canals, and countless other internal improvements, have been established and constructed at the public expense by all thrifty States, ancient and modern, and no serious question has been made as to the propriety of such expenditures."

After mature reflection, we are constrained to place the present proposition in the category of a public municipal purpose, though it is confessed that much might be said in favor of locating it in another field. *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611; *Wasson v. Commissioners of Wayne County,* 49 Ohio State, 622, 32 N. E., 472. Where the question is doubtful, as it is here, and the Legislature has decided it one way and the people to be taxed have approved that decision, it is the general rule of construction that the will of the law-makers, thus expressed and approved, should be allowed to prevail over any mere doubt of the courts. *Livingston v. Darlington,* 101 U. S., 407. It is only when the unconstitutionality of an act of the Legislature is clear that the courts, in the exercise of their judicial powers, are required to hold it for naught. Hence, every presumption is indulged in favor of the validity of the legislation called in question. *S. v. Yarboro,* 194 N. C., 498; *S. v. Revis,* 193 N. C., 192, 136 S. E., 346; *S. v. Manuel,* 20 N. C., p. 154.

"To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind." *Norval, J.,* in *S. v. Cornell,* 53 Neb., 556, 74 N. W., 59, 39 L. R. A., 513, 68 Am. St. Rep., 629. Or as said by the Supreme Court of Illinois: "The inquiry into the validity of an act of the Legislature is an inquiry whether the will of the people as expressed in the law, is or is not in conflict with the will of the people, as expressed in the Constitution; and unless it be clear that the Legislature has transcended its authority, the courts will not interfere." *Lane v. Dorman,* 4 Ill., 238.

It should be observed, however, that we are dealing with the very fundamentals of government. The power to tax *only for a public purpose,* and not arbitrarily, is one of the chief distinctions between representative government and autocracy; and unless this difference is to be observed, the tyranny of the one, in matters of taxation, may become just as burdensome as the tyranny of the other. Every citizen has a right to insist that no majority, however large, shall take his property, under the guise of taxation or otherwise, for strictly private uses or for objects which do not concern the public welfare. Indeed, it is well settled by all the decisions on the subject, with none to the contrary, that the power of taxation may not be employed for the purpose of establishing, aiding or maintaining private business enterprises, whose sole object is the individual gain of the proprietors, no matter how beneficial to the community such enterprises may be. *People v. Parks,* 58 Cal., 624; *Allen v. Jay,* 60 Me., 124, 11 Am. St. Rep., 185. The attempted exercise of the taxing power for such purposes was long ago characterized as taxation "to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom." *Opinion of Justices,* 58 Me., 590-603. However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means. *Parkersburg v. Brown,* 106 U. S., 487; *English v. People,* 96 Ill., 566; *Bank v. Iola,* 9 Kan., 689.

It follows, from what is said above, that the validity of a contract of a municipal corporation, which can only be fulfilled by resort to taxation, depends upon the power and authority of the municipality to levy a tax for the purpose for which the money is to be used. *Manning v. City of Devils Lake,* 13 N. Dak., 47, 99 N. W., 51, 112 Am. St. Rep., 652. The right to tax depends upon "the ultimate use, purpose and object for which the fund is raised." *Sharpless v. Philadelphia,* 21 Pa. St., 147, 59 Am. Dec., 759. There is no power to tax for an object not within the purposes for which governments are established. *State ex rel. Owen v. Donald,* 160 Wis., 21, 151 N. W., 331.

The reasons sustaining this position are so well stated in *Lowell v. City of Boston,* 111 Mass., 454, 15 Am. Dec., 39, which has been cited with approval in every jurisdiction, that we quote somewhat at length from the opinion of *Wells, J.,* in that case:

"The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect to property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

"The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. . . . The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."

As above indicated, we are not disposed to overturn the action of the Legislature in the instant case, sanctioned, as it is, by a vote of the people primarily liable for the bonds and necessarily affected by the tax. The determination of what is and what is not a public purpose belongs, in the first instance, to the legislative department. *State ex rel. Douglas County v. Cornell,* 53 Neb., 556, 74 N. W., 59, 39 L. R. A., 513, 38 Am. St. Rep., 629; *State v. Nelson County,* 1 N. D., 88, 45 N. W., 33, 8 L. R. A., 283, 26 Am. St. Rep., 609. But we would not be understood as holding that the legislative determination of the matter is conclusive. *Carman v. Hickman County,* 185 Ky., 630, 215 S. W., 408. In its final analysis it is a question for the courts.

Speaking to the subject in *Loan Association v. Topeka,* 87 U. S., 655, *Mr. Justice Miller,* delivering the opinion of the Court, very forcibly says:

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . .

"Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by *Marshall, C. J.,* in the case of *McCulloch v. The State of Maryland,* 4 Wheaton, 431, that the power to tax is the power to destroy. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

The regularity of the election, at which the bonds in question were approved by a majority of the newly registered voters of the city of Raleigh was originally raised on the record, without any discussion of the question on brief. For this reason, additional briefs were invited, but as the parties do not regard the question as moot, we confine our decision to other matters. *Hill v. Skinner,* 169 N. C., 405, 86 S. E., 351; *Rigsbee v. Durham,* 98 N. C., 81, 3 S. E., 749.

Affirmed.

GARRETT H. JERNIGAN, BY HIS NEXT FRIEND, v. ELLA NEIGHBORS AND COLON NEIGHBORS.

(Filed 29 February, 1928.)

1. Judgment—Non Obstante Veredicto—Nature in General.

Under the modern practice judgment *non obstante veredicto* may be given for either party but only when the party against whom the verdict was returned is entitled to judgment upon the pleadings.

APPEAL by plaintiff and defendants from *Grady, J.,* at November Term, 1927, of HARNETT. New trial.

Action to recover damages for personal injury. The issues were answered as follows:

1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. If so, was the plaintiff guilty of negligence which contributed to said injury? Answer: No.

3. What damages, if anything, is the plaintiff entitled to recover of the defendants? Answer: $750.

Upon the verdict the following judgment was rendered:

This cause coming on for hearing, and the defendants having moved for judgment as of nonsuit at the close of plaintiff's evidence, and again at the close of all the evidence, and the court having reserved its ruling upon said motion and submitted issues to the jury, and the same having been answered as appears from the minutes, the plaintiff tenders judgment upon the verdict, which the court refuses to sign. Defendants move to set the verdict aside, and this motion is denied.

But the court, being of opinion that evidence is not sufficient to support the allegations of the complaint, especially in that it is alleged that the immediate cause of plaintiff's injury was the fact that Colon Neighbors directed him to kneel before the gin and remove cotton, and there being no evidence that Colon Neighbors did so; and the court also being of the opinion that said verdict ought not to stand in good conscience, under the pleadings and proof:

It is now considered by the court, notwithstanding the verdict, ordered and adjudged that the plaintiff is not entitled to recover, and this action is dismissed at the cost of the plaintiff and the surety on his prosecution bond.

H. L. Godwin for plaintiff.
Young & Young for defendants.

ADAMS, J. In rendering judgment against the plaintiff, "notwithstanding the verdict" in his favor, the trial court inadvertently fell into error. At common law a judgment *non obstante veredicto* could be granted only when the plea confessed the cause of action and set up matters in avoidance which, if true, were insufficient to constitute either a defense or a bar to the action. It was entered only upon the application of the plaintiff, and never in favor of the defendant. Under the modern practice, it may be given for either party, but only when the party against whom the verdict was returned is entitled to judgment upon the pleadings. 33 C. J., 1178; *Fowler v. Murdock,* 172 N. C., 349; *Baxter v. Irvin,* 158 N. C., 277; *Doster v. English,* 152 N. C., 339; *Shives v. Cotton Mills,* 151 N. C., 290. Here the judgment was not awarded upon the pleadings; it was granted upon "the pleadings and proof"—primarily because the "evidence was not sufficient to support the allegations of the complaint." The judgment, therefore, cannot be sustained on the ground that the defendants are entitled to relief *non obstante veredicto.*

The remaining questions are whether the inconsistent recitals in the judgment are not such as to prevent the giving of relief to either party and whether a new trial is not necessary. If, as the judgment recites, the evidence was insufficient the motion for nonsuit should have been allowed; but the motion, although reserved, was disposed of, if at all, only inferentially after the verdict had been returned. According to the decision in *Riley v. Stone,* 169 N. C., 421, it should have been granted or refused at the conclusion of the evidence, for after verdict an action can be dismissed only for want of jurisdiction or for the plaintiff's failure to state a cause of action. On this point the substantial recitals are that the motion was denied although it should have been allowed.

In the next place, if the verdict stands the plaintiff is entitled to judgment; although it is said that it "ought not to stand in good conscience," it remains in force because the motion to set it aside was denied. While the verdict upon its face entitles the plaintiff to judgment, the judge refused to sign the judgment which the plaintiff tendered. If we simply reverse the judgment the verdict will stand, and in that event the plaintiff will recover damages to which, according to the judgment, he is not entitled upon the evidence; and as the motion to dismiss the action cannot now be allowed, we are of opinion that the judgment should be reversed, the verdict set aside, and a new trial awarded. The judgment differs materially from that which was rendered in *Davis v. R. R.,* 170 N. C., 583, the procedure in which apparently was not presented for consideration. *Rankin v. Oates,* 183 N. C., 517.

New trial.

ANNIE L. CHERRY v. JOHN B. GILLIAM AND SALLIE B. GILLIAM, HIS WIFE.

(Filed 29 February, 1928.)

1. Mortgages—Rights and Liabilities of Parties—of Purchaser under Foreclosure—of Mortgagor—Redemption.

The last and highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under the provisions of C. S., 2591, acquiring no right until the statutory provision of ten days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder.

2. Same.

Within the statutory limit of ten days from the time of a foreclosure on lands under the powers contained in a mortgage, the payment of the full mortgage debt to the mortgagee cannot be a wrong, or a fraud in damages on the last and highest bidder at the sale, and no recovery of damages can be had by him against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed.

3. Action—Grounds and Conditions Precedent in General.

Damages for an injury are awarded only when they are caused by a wrongful act done to the complaining party.

APPEAL by plaintiff from *Moore, Special Judge,* at January Term, 1928, of BERTIE. Affirmed.

Craig & Pritchett for plaintiff.
Gillam & Spruill for defendants.

ADAMS, J. W. T. Cherry and James S. Cherry owned a tract of land as tenants in common. On 4 February, 1922, W. T. Cherry and his wife executed and delivered to R. L. Spruill a mortgage deed conveying their undivided interest therein to secure a note held by the mortgagee. Spruill transferred the note and mortgage to John B. Gilliam, one of the defendants, and upon the mortgagors' default in payment Gilliam requested Spruill to sell the land under the power contained in the mortgage. The sale was made on 2 February, 1923, and the plaintiff became the last and highest bidder at the price of $355, subject to the provisions of C. S., 2591. Before the expiration of ten days from the time of the sale the mortgagors conveyed to Sallie B. Gilliam all their interest and estate in the mortgaged premises. The plaintiff alleges that this conveyance was procured by the grantee's husband with intent to defeat "her rights acquired in and to the said property by virtue of bidding the same off at the public sale"; but the defendants say that before the expiration of the statutory limitation Mrs. Gilliam purchased the land for a valuable and adequate consideration and paid the amount due on the mortgage, together with the expenses incurred in making the sale, and thereby became the owner in fee of the land in question. It is furthermore alleged that after the ten days had expired the plaintiff tendered to John B. Gilliam the amount of her bid and demanded of him the execution of a deed, and that he has refused to comply with her demand. The trial judge being of opinion that the plaintiff was not entitled to recover, rendered judgment in favor of the defendants and the plaintiff excepted and appealed.

It is provided in section 2591 that in the foreclosure of mortgages the sale shall not be deemed to be closed under ten days, and if within this time an increased bid is paid to the clerk the mortgagee, by order of the clerk, shall reopen the sale, advertise the property as in the first instance, and make a resale; and that upon the final sale the clerk shall issue an order to the mortgagee to make title to the purchaser. It has been held with respect to this statute that it was enacted for the protection of mortgagors when sales are made under a power of sale without a decree of foreclosure by the court; that it confers no power on the clerk to make any orders unless the bid is increased; that in the absence of such bid no report is necessary; and that if an increased bid is paid, the clerk cannot make any orders until the expiration of ten days. *Briggs v. Developers,* 191 N. C., 784; *Trust Co. v. Powell,* 189 N. C., 372; *In re Ware,* 187 N. C., 693; *Lawrence v. Beck,* 185 N. C., 196; *Pringle v. Loan Asso.,* 182 N. C., 316; *In re Sermon's Land, ibid.,* 122.

The plaintiff's object is not to compel Spruill, as the mortgagee who made the sale, specifically to perform his contract, for he is not a party to the suit; her object is to recover damages from the defendants for fraudulently accepting a deed from the mortgagors, and thereby defrauding her of the rights she had acquired in the property by virtue of her bid. What rights had she acquired? The word "damages" is defined as compensation which the law awards for an injury—"injury" meaning a wrongful act which causes loss or harm to another. In the last of the cases cited above *(In re Sermon's Land)* it is said that during the ten-day limitation prescribed in section 2591 the bidder acquires no interest in the property itself, but occupies a position similar to that of a bidder at a judicial sale before confirmation, and that such bid is considered only as a proposal to buy, which the court may accept or reject in its discretion. This familiar principle has been maintained with unbroken uniformity. It follows that the plaintiff during the ten days prescribed by the statute acquired no interest in the mortgaged property and suffered no loss for which she is entitled to recover damages. The plaintiff's "proposal to buy" did not confer a right which the law will recognize as paramount to the agreement by which pending the time limited the mortgage debt was satisfied and canceled. See *Sutton v. Craddock,* 174 N. C., 274; *Upchurch v. Upchurch,* 173 N. C., 88. Judgment

Affirmed.

ERNEST C. MAY, ADMINISTRATOR OF DONALD B. MAY, DECEASED, v. E. W. GROVE, P. H. BRANCH AND FRED COLLINS, AND ST. LOUIS UNION TRUST COMPANY AND EDWIN W. GROVE, JR., TRUSTEES UNDER THE WILL OF E. W. GROVE, DECEASED, AND ST. LOUIS UNION TRUST COMPANY AND EDWIN W. GROVE, JR., EXECUTORS OF THE WILL OF E. W. GROVE, DECEASED.

(Filed 29 February, 1928.)

1. Trials—Instructions—Conflicting Instructions—New Trial.

Where the charge by the court to the jury is conflicting upon its material aspects arising from the evidence, the jury is not presumed to have understood the error, and a new trial will be granted on appeal.

2. **Trials—Instructions—Cured Error.**

An erroneous instruction is not cured by a verdict upon which the judgment appealed from has not been entered.

3. **Appeal and Error—Review—When New Trial Awarded.**

Where two defendants are sued for a joint tort, and an erroneous instruction has been given as to the liabilities of one, materially prejudicing the other under the evidence in the case, on appeal a new trial will be granted as to both.

Appeal by plaintiff and defendants from *Deal, J.*, and a jury, at September Term, 1927, of Buncombe. As to both a new trial.

This is an action for actionable negligence by plaintiff against defendants. Plaintiff voluntarily submitted, pending the trial, to a judgment of nonsuit as to the defendant, P. H. Branch, E. W. Grove having died during the pending of the action, the trustees and executors under his will were duly made parties, viz.: St. Louis Union Trust Company and Edwin W. Grove, Jr., trustees under the will of E. W. Grove, deceased, and St. Louis Trust Company and Edwin W. Grove, Jr., executors of the will of E. W. Grove, deceased.

The issues submitted were negligence, assumption of risk, contributory negligence and damages.

The action was tried out against the defendants, Fred Collins and the trustees and executors of E. W. Grove, having been made parties at his death, as stated.

Carter & Carter for plaintiff.
Merrimon, Adams & Adams for defendants.

Clarkson, J. The court below charged the jury as follows: "It has been stipulated or agreed, at least by the plaintiff, and the plaintiff only contends that the defendant, E. W. Grove (or rather E. W. Grove's executors, the Grove estate), is liable at all except by and through the negligence of the defendant Collins, if you find by the greater weight of the evidence that the defendant Collins was negligent. In other words, the plaintiff does not contend that E. W. Grove himself was negligent, or that he was negligent through any other employee than the employee Collins. Since the plaintiff has conceded that the Grove estate is liable, if at all, only by reason of the negligence on the part of the defendant Collins, then the court charges you that the burden of proof is upon the plaintiff by the greater weight of the evidence to satisfy you that the defendant Collins, as agent and employee of E. W. Grove, was guilty of negligence in the several respects to which the court will hereafter refer, and that unless you find by the greater weight of the evidence that the defendant Collins was negligent, and that such negligence was the proximate cause of plaintiff's intestate's death, and that at the time of such negligence he was working in the scope of his employment as agent and servant of the defendant Collins, then you will answer that issue No—the first issue No."

The court further charged the jury: "If you should answer the first issue Yes, then you will indicate whether you are answering that issue as to both defendants, or either defendant, and if so, which, or only one of the defendants, and if so, which one. If you answer it Yes, as to either or both defendants, then you will proceed to consider the other issues. If you answer the first issue Yes, as to either defendant, or as to both defendants, you will proceed to consider the second issue."

The defendants excepted and assigned error on the ground that the charge was conflicting, and we must so hold.

In *Edwards v. R. R.,* 132 N. C., at p. 101, it is held: "It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly. *Edwards v. R. R.,* 129 N. C., 78; *Williams v. Haid,* 118 N. C., 481; *Tillett v. R. R.,* 115 N. C., 662." *Hoaglin v. Tel. Co.,* 161 N. C., 390; *Champion v. Daniel,* 170 N. C., 331; *Kimbrough v. Hines,* 180 N. C., 274; *S. v. Falkner,* 182 N. C., 793; *S. v. Bush,* 184 N. C., 778; *Young v. Comrs.,* 190 N. C., 845; *Warren v. Fertilizer Works,* 191 N. C., 416.

The conflicting parts of the charge must be material. It goes without saying that the court can correct any part of the charge theretofore given which is conflicting, to make the charge consistent. In the present action the charge was conflicting on a material matter and prejudicial. The first issue submitted to the jury was as follows: "Was the death of plaintiff's intestate caused by the negligence of the *defendants,* as alleged in the complaint?"

As the case goes back for a new trial on defendant, E. W. Grove's (executor's) appeal, we will not go into the attitude of the jury in plaintiff's appeal in answering the first issue "Yes," and then in response to the court the foreman said, "We answer as to both," and being sent back and then answered, "Yes, E. W. Grove." We will consider plaintiff's appeal with defendant's appeal and order a new trial as to both defendants, Fred Collins and E. W. Grove (now the trustees and executors). Both were sued as joint *tort-feasors,* and the matters are so interwoven that the same error which entitled the defendant, E. W. Grove, to a new trial likewise entitled the plaintiff to a new trial as against the other defendant, Fred Collins. We think this consonant with justice to all parties on the record.

The error in the charge might have been cured by the verdict had the judge allowed the jury's original answer to the first issue to stand, but the verdict as finally rendered and accepted demonstrates the prejudicial effect of conflict in the charge.

It appears from the record that the Court below was painstaking and careful, but in a long trial errors will often be made inadvertently. It is necessary for an orderly system of procedure that we adhere to settled rules where they are material and the nonobservance prejudicial. On both appeals a

New trial.

D. E. OXENDINE v. W. H. STEPHENSON.

(Filed 29 February, 1928.)

Deeds and Conveyances—Requisites and Validity—Statute of Frauds.

Where the vendor of lands in substantial conformity with his parol agreement with his vendee tenders a deed to the lands to him, which the latter refuses because the amount of the agreed purchase price had been increased, and after the vendor had sold the lands brings his action for damages: *Held*, the deed tendered is a sufficient writing within the statute of frauds to bind the vendor, and the vendee may recover the damages he has sustained by the defendant's breach of contract to convey.

APPEAL by defendant from *Grady, J.*, at November Term, 1927, of HARNETT.

Civil action to recover damages for an alleged breach of contract to sell a tract of land containing approximately eleven acres.

Upon denial of liability and a plea of the Statute of Frauds, the jury found in substance:

1. That the defendant agreed to sell the land in question to the plaintiff for the sum of $250.

2. That the defendant prepared and executed a deed to the plaintiff, in furtherance of said agreement, and placed the same in the hands of his attorney for delivery to plaintiff.

3. That upon tender of deed, plaintiff offered to pay the sum of $250, but was informed that the purchase price was $275, which plaintiff declined to pay.

4. That the fair market value of said land, on day of sale, was $800.

Judgment on the verdict in favor of the plaintiff for $550, from which the defendant appeals, assigning errors.

F. H. Taylor and Chas. Ross for plaintiff.

Dupree & Strickland and Young & Young for defendant.

STACY, C. J. The exceptions presented by defendant's appeal are without special merit, and they will not be considered *seriatim.*

The action is for damages, rather than for specific performance, because, at the time of the institution of the suit, the defendant had parted with title and conveyed the land to a third person.

While the authorities elsewhere are conflicting, it is the rule in this jurisdiction that when one, who has agreed orally to sell land, prepares and signs a deed, which substantially expresses the bargain, and delivers the same in escrow, such writing is a sufficient memorandum to meet the requirements of our Statute of Frauds, and the contract may be considered and dealt with as a valid and binding agreement. Such was the holding in *Pope v. McPhail,* 173 N. C., 238, 91 S. E., 947, and *Vinson v. Pugh, ibid.,* 189, 91 S. E., 838; and the decisions in *Flowe v. Hartwick,* 167 N. C., 448, 83 S. E., 841, and *MaGee v. Blankenship,* 95 N. C., 563, are in recognition of the same principle.

No error having been made to appear, the verdict and judgment will be upheld.

The plaintiff also noted an exception to the judgment and gave notice of appeal, but this does not seem to have been prosecuted.

No error.

R. L. COBURN, RECEIVER FOR MARTIN COUNTY SAVINGS AND TRUST COMPANY, v. J. T. BARNHILL AND J. E. PEGRAM.

(Filed 29 February, 1928.)

Limitation of Actions — Construction of Statute — Part Payment by Creditor.

The statute of limitations of actions will bar a recovery against the maker of a note, endorsed by another, after three years from the time he has denied making it, irrespective of the time of payments endorsed thereon from the sale of shares of stock therein pledged as collateral.

APPEAL by plaintiff from *Townsend, Special Judge,* at October Special Term, 1927, of MARTIN.

Civil action to recover balance alleged to be due on a promissory note for $1,650, dated 17 June, 1922, signed by J. T. Barnhill and endorsed in blank to J. E. Pegram.

The record contains the following statement:

"It was agreed that the defendant, Barnhill, in 1922, shortly after the note was given, denied all liability on the note and denied ownership of the stock issued by the Joint Stock Land Bank and attached to said note. It was admitted that no payments were ever made on the note except those shown by the following credits on the back thereof, namely, 'By sale of seven shares of stock 2/14/24, $770, by dividend 2 July, 1924, $16, 12/19/24, $880 by eight shares of stock,' all of which credits were made on the note by the Martin County Savings and Trust Company. It was admitted that this action was brought 8 February, 1927, within three years from the date of the last credit on the back of the note as above set out, but more than three years after the defendant Barnhill had denied his liability on said note and refused to accept the stock which had been issued and attached thereto as his property. Upon the foregoing facts being admitted, the court holds the action is barred by the statute of limitations and directs a verdict upon the first issue in favor of the defendants."

From the judgment holding the action to be barred, plaintiff appeals, assigning error.

A. R. Dunning and B. A. Critcher for plaintiff.
Hugh G. Horton for defendants.

STACY, C. J. The action of the trial court in holding that the credits, derived from dividends and sale of collateral, entered on the note in suit by the Martin County Savings and Trust Company, after the maker had denied liability and repudiated ownership of the stock attached as collateral, did not repel the bar of the statute, must be upheld on authority of what was said in *Nance v. Hulin,* 192 N. C., 665, 135 S. E., 774, where the pertinent decisions are collated and distinguished, with special reference to *Bank v. King,* 164 N. C., 303, 80 S. E., 251, cited and relied upon by appellant. It would only be a matter of repetition to state again what has been so recently said in this case.

No error.

STATE v. C. A. HOLT.

(Filed 29 February, 1928.)

1. Criminal Law—Evidence—Character Evidence.

Exceptions by defendant in a criminal action to questions tending to impeach the character of his witnesses cannot be sustained on the ground that he had not taken the witness stand, or placed his own character in evidence.

2. Criminal Law—Pleading—Amendment to Indictment, When Allowed. An indictment before a justice of the peace may be amended by the trial judge upon the trial in the Superior Court on appeal. C. S., 1500.

APPEAL by defendant from *Grady, J.*, at September Special Term, 1927, of JOHNSTON. No error.

Defendant was convicted at a trial in the recorder's court of Johnston County, upon warrant charging possession of intoxicating liquor for the purpose of sale. From judgment upon this conviction he appealed to the Superior Court of said county. He was there tried upon the original warrant, as amended.

From judgment upon a verdict of guilty defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. F. Hatch, J. Ira Lee and Winfield H. Lyon for defendant.

PER CURIAM. Defendant's assignments of error upon his appeal to this Court cannot be sustained.

Defendant did not testify as a witness in his own behalf. His objections to questions addressed to witnesses offered by him, upon their cross-examination by the Solicitor for the State, were properly overruled. They did not tend to impeach him, or to show that his character was bad. The principle applied in *S. v. Adams,* 193 N. C., 581, was not applicable to these questions or to the answers thereto. If answers to the questions had any probative force, they tended to impeach the witness, and not the defendant, and were competent for that purpose.

Nor was there error in allowing, during the progress of the trial, amendments to the warrant upon which defendant was tried. Defendant had ample opportunity to offer evidence with respect to the matters alleged in the amendments. The effect of the amendments was merely to add additional counts in the warrant. They were allowed in view of the evidence elicited during the trial. The order allowing the amendments is sustained by *S. v. Poythress,* 174 N. C., 809. In the opinion in that case it is said: "The policy of the law, as evidenced by section 1467 of the Revisal (now C. S., 1500, Rules 12 and 13), and numerous decisions of this Court, is one of liberality in allowing amendments in the Superior Court to warrants issued by justices of the peace, and such amendments are allowed even after verdict *(S. v. Smith,* 103 N. C., 410), and even after a special verdict *(S. v. Telfair,* 130 N. C., 645). The only restriction would seem to be that the amendment must be made to conform to the evidence elicited on the trial, as shown by the record *(S. v. Baker,* 106 N. C., 758)." Judgment affirmed.

No error.

STATE v. ERNEST B. LEONARD.

(Filed 29 February, 1928.)

1. **Appeal and Error—Review—Scope and Extent in General.**

On appeal from a verdict of manslaughter the Supreme Court will only review questions of law and legal inference arising from the record and properly presented. Const., Art. IV, sec. 8.

2. **Criminal Law—Evidence—Competency—Automobiles.**

In an action involving the question of defendant's criminal negligence in killing the deceased in driving an automobile upon a public highway while under the influence of intoxicating liquor, with gross negligence and indifference to the life and property of others, and thus striking another car in which deceased was riding, evidence as to the serious injury of one in the car that he struck is competent upon the question of the speed of the car the defendant was driving at the time of the collision, and of the defendant's gross negligence under the circumstances.

3. **Same.**

Where there is abundant evidence tending to show that the defendant was guilty of criminal negligence in driving his car at a reckless speed, while intoxicated, and that he struck another car on the highway in which the deceased was riding as a guest, and thus caused her death, the admission of the opinion of one as to the excessive speed of the defendant's car, judging only from the sound made at the time by a passing car, which he could not have identified was, by reason of all the other testimony in this case made harmless error.

4. **Same.**

Where the defendant is indicted for criminal negligence causing the death of deceased, among other things, by excessive and reckless speeding the car he was driving on the highway while drunk, which collided with another car in which the deceased was riding, testimony of a witness as to the speed of the car in passing him of the same make and kind of car a few moments afterwards he saw at the scene of the accident, and which the defendant was driving at the time, is competent, with the other evidence as a circumstance on the question of defendant's guilt.

5. **Criminal Law—Instructions—Held Not Error.**

Where it clearly appears that the judge referred to all the evidence on the trial of a criminal action, his referring to it as "the evidence" in his charge as to the burden of proof is not reversible error.

6. **Criminal Law—Instructions—Harmless Error.**

Where a defendant is convicted of manslaughter, error if any in the charge on the question of murder in the second degree is cured by the verdict, and will not be considered on appeal.

7. **Same.**

Where the defendant is criminally indicted for the killing of the deceased in a collision on a public highway by the reckless driving of his car, an instruction upon conflicting evidence is correct, and not prejudicial to the defendant, that he would not be guilty if another was driving the car who was not doing so under his direction or control, and the contrary was to be shown beyond a reasonable doubt by the State.

8. **Criminal Law—Evidence—Motion of Nonsuit.**

When the defendant on trial under a criminal indictment for recklessly driving his car and colliding with another car in which deceased was riding, on a public highway, causing her death, and there is both direct and circumstantial evidence that the defendant was driving the car at the time, which his own testimony and evidence of his witnesses contradicts, his motion as of judgment of nonsuit made at the close of the State's evidence and renewed after all the evidence, is properly denied. C. S., 4643.

9. **Criminal Law—Degree of Proof—In Criminal Negligence Cases.**

The degree of negligence necessary to be shown to convict the defendant of criminal negligence in causing the death of one upon the highway by the driving his automobile thereon is such recklessness or carelessness as is incompatible with a proper regard for human life.

10. **Trials—Instructions—Necessity of Requests For.**

Where the charge of the judge to the jury is broadly sufficient and correct, it becomes the duty of the complaining party to ask for more specific instructions arising from the evidence, should he so desire.

APPEAL by defendant from *Finlay, J.*, and a jury, at August Term, 1927, of CABARRUS. No error.

The defendant was indicted for the murder of Evelyn A. Gentry. When the action was called for trial, and before the jury was empaneled, the Solicitor for the State announced that he did not ask for a verdict of murder in the first degree, but only for a verdict of murder in the second degree, or manslaughter, as the facts might justify. To the charge in the bill of indictment the defendant plead, Not Guilty.

The evidence on the part of the State: That of Rev. C. K. Gentry was to the effect that he lived at Kannapolis, attended religious services in Concord on the night of 12 May, 1927. He was returning home in a Chevrolet touring car; was driving the car and beside him on the front seat was his wife with their grandchild, about ten months old, in her lap. His married daughter, Mrs. Baker, the mother of the child, was in the rear seat on the left side of the car, and Evelyn A. Gentry, the deceased, about 14 years and five months of age, on the right-hand side. At the intersection of Mulberry Street in the outskirts of Kannapolis, with State Highway No. 15, he prepared to make a left-hand turn. Evelyn, who was killed, looked back. He looked back and threw out his hand. Looking forward he saw an automobile about 150 or 200 feet on the highway coming from Kannapolis. Seeing he had plenty of time to make a left-hand turn, he gradually swung to the left at the rate of 15 or 20 miles an hour, with his hand out as he turned left on the highway. Another pair of headlights flashed into view, the car coming around the car he had first distanced; the car came on them at a tremendous rate of speed. He stepped on the gas and made every effort to escape the highway, and did so with the exception of the rear wheel, which was 2½ feet on the hard surface. The speeding car caught the car he was driving just inside the rear fender. His car was completely demolished from the windshield back. He crawled out and found his married daughter was lying right at the wreckage. His wife was 8 feet south of the wreckage, and the baby 6 or 8 feet south of where his wife was lying. He then began to search for Evelyn, the deceased, and found her 50 feet south of the wreckage. "Picked her up, found she was dead, horribly mangled, totally decapitated—face was crushed in. She was broken to pieces." Laid her down and gave attention to the others and returned to the dead girl. A young man, James Miller, was standing there. "While we were standing there, and while waiting for the undertaker to come and take the body, Leonard, the defendant, walked up, put his hand on my shoulder and gave me a gentle shove as if to attract my attention, and with a drunken leer, thick tongue, said: 'And you say I killed your daughter?' I said, 'The man who was driving that car killed my girl.' He said, 'I was driving the car and I didn't kill your girl.' I said, 'I repeat, the man who was driving that car killed my girl.' He said, 'I was driving the car and I didn't kill your girl.' I said, 'Isn't there an officer in the crowd?' He said, 'You are a hell of a preacher—talk like that.' Mr. Chapman pushed his way through the crowd and said, 'Yes, I am here.' I said, 'Take charge of this man.' He led him away." He stated in his opinion the car that struck his car was coming at not less than 60 miles an hour and more at the highest figure—more like an airplane than an automobile. "The car never swerved, no squeak in the brake, never slackened the speed nor swerved from me or attempted to dodge me. Don't know how wide Highway 15 is. I smelled whiskey very strong when defendant walked up in my face. He made no other remarks except what I have stated. I could hear the car that struck me pounding as it passed on by, then heard it turn over. Saw the car later in the field, off the highway to the right, 35 or 40 feet from the highway, and about 160 feet from where it struck my car. The automobile I observed approaching me as I made the left turn never reached me, nor anyways near me."

I. T. Chapman, a deputy sheriff, who lived nearby, was at his home; heard a speeding car pass by and the crash. Got to the wreck in five minutes. "Just as I got there, Mr. Leonard came up and made some remark to Mr. Gentry; didn't understand what he said; heard Gentry ask if there was an officer there, and about that time I crossed over; saw he was drunk. Asked Leonard whose car that was. Saw him coming from the direction of that car that was lying out in the field, and he said, 'That is my car.' I said, 'Who was driving that car?' He said, 'I was driving it.' I said, 'You consider yourself under arrest.' We got out in the highway; told him he ought to be ashamed of himself. Heard him use that curse word at Preacher Gentry. He said, 'I don't give a damn,' or something; I couldn't repeat it. He said, 'Well, I didn't kill that girl.' I said, 'If you were driving the car you killed the girl.' He said, 'I was driving the car, but I don't know a damn thing about the girl being killed.' . . . He made the statement to me several times that night, and to several more people, that it was his car and he was driving it. . . . We got a bottle with a little bit of whiskey in it from under the car; right beside the car; wasn't under it. The car was leaning, and it was picked up on the edge of the car—a pint bottle. The defendant was drunk at the time I first saw him."

George Vogler, who was in the car with defendant, Leonard, testified that at the time of the collision that Ernest B. Leonard, the defendant, was driving the car.

C. W. Davis, who was also in the car with defendant, testified in part: "We came on this side of Salisbury, and Leonard looked like he was getting sort of wild-eyed, and he said 'I am going to drive my automobile.' Said, 'Let's me and you get in the front seat.' I said, 'No, I am scared to ride with you; you are drinking.' He said, 'I am going to drive it'; said 'Stop, Vogler,' two or three miles this side of Salisbury. We stopped and all got out of the car. Leonard told Vogler to give him his keys. My wife spoke up and said, 'Mr. Leonard, if I was you I wouldn't try to drive that car; you have been drinking; you are liable to have an accident.' He said, 'It is my automobile, and I am going to drive it.' I said, 'I know it's your car.' And he said, 'You all are going to stay out of it if I don't drive it.' I said, 'We can stay out of it; I can catch a train and me and my wife get back to Charlotte.' He said, 'We all came up here together. I will drive it and drive careful.' I said, 'No, let's don't get back.' He kept on talking in a friendly way and we decided to let him drive. Me and my wife got in the back seat and left Leonard at the steering wheel, Vogler beside him, and started back towards Charlotte. Leonard was driving. We drove down to where we could see the lights of Kannapolis. I had worked the night before. I threw my head over on my wife's shoulder and dozed off to sleep. The next thing I knew—it was like a flash—and the next thing I knew was next morning in the Concord Hospital at 5:30 or 6:00 o'clock; had me on the operating table three hours and took 156 stitches in my head. Leonard was driving when I dozed off to sleep."

Mrs. C. W. Davis testified, in part: "I got in the back seat with my husband. Leonard took the steering wheel and Vogler got in the front seat and sat beside him. We were right on the edge of Salisbury coming back toward home. Mr. Leonard from then to the wreck. Mr. Leonard was driving when the wreck occurred. I asked him several times not to drive fast, and my husband asked him two or three times. I was scared because I knew he was driving, but his appearance did not show that he was drunk; he was drinking. When I asked him not to drive so fast, he would say that was his car, and he was going to drive it like he wanted to. My husband leant his head over on my shoulder and dozed off to sleep. I remember crossing the spur track that runs into the Cabarrus mill at the edge of Kannapolis. I should think we got a little faster after we passed there. When we crossed there the car kind of jumped. I should think he was driving fifty or sixty miles. He was driving so fast, I'd say we were fifteen feet from Mr. Gentry's car before I noticed it. Mr. Gentry was as far on the side of the street, and he was driving the way he was supposed to drive. I suppose he was driving fifteen or twenty miles an hour. When the cars hit it knocked me unconscious. I didn't know anything at all, but I came to myself one time—just realized a second. I was lying on the ground. I didn't know anything else at all. We got to the hospital, and I saw them carrying my husband to the steps. I was cut up; I was hurt in my chest and shoulders, and inwardly. I did not see Mr. Vogler drink any whiskey that day. He was not intoxicated."

R. O. Bolin testified in part: "I could see the Chrysler car from the time it passed until it hit the car, all but one time, it went around the Buick. I couldn't say how fast it was running, but at a tremendous rate of speed. I would say about 75 miles. I saw it when it hit the Chevrolet. I saw it pass another car after it passed me before it hit. It had already passed over the switch track at the mill when it passed me—jumped two or three feet when it hit that track. It did not slow down; it speeded up. . . . When I got to the car I didn't see any one around the car at all. . . . We looked in. Leonard's right foot over his left foot, and that peg off of the door; that rod that goes up and down is what was holding his foot. I mean the upright piece between the front and rear door. This fellow that came up behind us jerked this piece out after a little while. Leonard was groaning and hollering 'I am dying.' After this fellow pulled this piece out he started around to the rear of the car and me and Glenn (Walker) stood there trying to get Leonard out, and as he came out he was cussing, and Mr. Walker asked who was driving this car, and he said 'I was driving it. I will drive anywhere any time'—something like that. We helped pull him out, and he walked on down the street. The car was standing right straight up on its top. *I couldn't say just for sure which side, with reference to the steering wheel, Leonard was on, but my best sight he was lying—part of him was under the front seat—and I think he was lying with his feet higher and his head right back angling toward the steering wheel.* I couldn't say for sure, but he wasn't in the rear seat altogether, because Davis was back there. I helped Davis out."

Glenn Walker testified in part: "I got down there and some one hollered to go to the next car. I went to the Chrysler as quick as I could get there. There was one man there trying to get Leonard's legs. He grabbed his breeches leg and tore them, and Leonard was hollering, 'I am dying!' And after he got that rod that holds the door Leonard started crawling out, and I left Leonard and went around on the other side, and me and Raymond (Bolin) pulled the man out of the Chrysler. I said, 'Man, were you driving this car drunk?' And he brought out thick-tongued profanity, and said 'Yes, I was driving this car, and will drive it anywhere any time I want to.' We started to turn the car back over this way, and Leonard said, 'Do not turn it over this way; you will turn it over on the man.' We turned it north and Raymond (Bolin) and me picked Mr. Davis up and laid him on the bank and started toward Gentry, looking for somebody to bring him to Concord. I said, 'Mr. Gentry, is there anybody hurt?' And he said 'Yes, he has killed my girl.' Leonard came up there, and he threw his hands up and said, 'You killed my daughter.' 'The man that was driving that car killed my girl.' *Leonard said he was driving the car, but to hell with damn girl. . . . The car was turned bottom upwards. Part of Leonard's body was under the front seat, and his legs were sticking out the front door, if I am not badly mistaken."*

James Miller testified in part: "I saw the Chrysler car pass just the other side of the first railroad crossing. I heard it before it got to me, and saw it pass. It was making between 65 and 75 miles an hour. . . . Found Evelyn lying in the ditch with her coat pulled up over her head, and I raised her head up out of the sand in the grass, and by that time Mr. Gentry came down there and said, 'Is she dead?' And I said 'Yes,' and he commenced hollering, 'Don't let my wife come up here.' About that time Mr. Leonard came up and Mr. Gentry said, 'Who was driving this car?' And Leonard said, 'I was driving the car.' He said, 'Well, you have killed my little girl.' Leonard said, 'No, I haven't killed your little girl.' And Gentry said, 'If you were driving that car, you are the man that killed my little girl.' By that time Mr. Chapman, an officer, stepped up and Gentry told Chapman to take Leonard in charge. I didn't go down to the Chrysler car. I heard Leonard say, 'You are a hell of a preacher.' "

Elton Morgan testified: "Was at the corner of Cabarrus Mill on night of 12 May; saw a Chrysler car pass. I guess it was going about 75 miles an hour. I heard the crash when it ran into the Chevrolet. . . . I was about 200 yards from Mulberry Street."

Roy Young testified in part: "I saw the Chrysler car before the wreck. I was in an automobile about fifty yards from the wreck coming toward Concord. The Chrysler car passed me. I wouldn't think it was running under sixty miles an hour."

C. E. Nussman testified in part: "I was in the jail when they brought Leonard in. He was put in jail. I asked him who was driving the car, and he said it was his car and he was driving it."

J. E. Durham testified in part: "Leonard was walking up and down the walk in front of his car, and using an oath. Some one asked who was driving the car, and he spoke up and said, 'I was driving the car; it was my car and I was driving it; it was making seventy miles an hour; if it would have made more, I would have been making that.' "

The defendant in his brief in part contended, and his testimony and some of his evidence sustained the contention: "That at the time of the collision the occupants of the Chrysler automobile were E. B. Leonard, George Vogler, C. W. Davis and Mrs. C. W. Davis. As to who was operating the Chrysler automobile owned by defendant, E. B. Leonard, at the time of the collision, or if a person other than E. B. Leonard himself was operating the car, whether said person was doing so by the consent and approval of defendant, E. B. Leonard, there is a sharp dispute and in fact the whole case would seem to hinge upon this fact. The State contends that Leonard himself was driving the car at the time of the collision, but produced no direct evidence of the fact except alleged statements made by the defendant himself immediately following the wreck, when the testimony of both the State and the defendant shows clearly that he was not in a mental condition to comprehend what he was saying or the meaning of any statements he was making, and further shows that he did not comprehend what he was saying and which statements were consistently denied by the defendant when he came to his senses and regained his mental balance; and, second, the statements of the other occupants of the Chrysler automobile, one of whom testified that he had been drinking liquor at the time; and the other two obviously being interested in fixing the responsibility upon the defendant to save themselves, besides one admitting on cross-examination that he had manufactured and drank home-brew; was at the time under indictment for this offense; and the other being the wife of one of the occupants of the automobile and interested with him in the manufacture of home-brew according to her own testimony. On the other hand, the defendant, E. B. Leonard, testified that he was not driving the car at the time of the collision, and in fact could not have been from his condition, and not only that, but that none of the occupants of the car were driving it with his consent and approval. . . . That at the solicitation and urgent request of Mrs. Davis and Vogler he consented for Vogler to drive his car for a ride around the city of Charlotte." That he got in the back seat and Vogler took them in a northerly direction from Charlotte. "That Leonard began to demand his car and that they take him back to Charlotte; that they promised to take him back to Charlotte, but Vogler refused to give him the car, and continued to drive it against the defendant's will and express orders, promising, however, to take Leonard back to Charlotte; that after riding some distance and realizing that Vogler was not taking him back to Charlotte he (defendant) became insistent that Vogler deliver possession of his car to him and threatened to have the whole party arrested. That thereupon Vogler stopped the car, got out of it and assaulted the defendant, Leonard, severely, knocked him in the back seat of the car with Davis, and that Vogler continued to drive the car; that the defendant never regained consciousness until after the wreck had occurred and he had been placed in jail; that when he did regain consciousness and was told of the wreck and the result, he demanded of the officer that Vogler be arrested as the driver of the car; that he, the defendant, was in the back seat of the car at the time of the collision and it was impossible for him in his then condition to have been operating the automobile or to have been directing its operation, and that Vogler was driving the car against the express consent of the defendant and only because he had secured the possession of it by the assault of the defendant; and as to the position of Leonard in the automobile at the time of the collision his testimony is supported by all the natural evidence in the case. . . . That Leonard and Davis were in the back part of the car and that Leonard was wedged and caught by his leg between the upright piece which runs up to the rear of the front seat and the back part of the car. It would have been almost a physical impossibility for the collision to have thrown Vogler and Mrs. Davis from the rear seat into the front seat, and at the time to have thrown Davis and the defendant, Leonard, from the front seat and under the steering wheel into the rear seat, down on the floor between the seats and to have wedged Leonard in, in the way and manner described by the witnesses."

Defendant introduced numerous witnesses who testified that his general reputation was good.

The jury returned a verdict of guilty of manslaughter. "The judgment of the court is that the defendant be confined in the State's prison for a period of not less than ten, nor more than fifteen years, and assigned to such labor as he is capable of performing by reason of his physical condition."

The defendant made numerous exceptions and assignments of error. The material ones and other necessary facts will be considered in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

T. L. Kirkpatrick, Hartsell & Hartsell and B. G. Watkins for defendant.

CLARKSON, J. We have set forth the facts on the part of the State and the facts to exculpate himself as stated by defendant in his contentions, perhaps more fully than was necessary; but, as we view the action, it resolved itself into purely a question of fact for the jury to determine from the evidence.

The jurisdiction of this Court in an action of this kind is, "To review, upon appeal, any decision of the courts below upon any matter of law or legal inference." Const. of N. C., part Art. IV, sec. 8.

We will consider the exceptions and assignments of error made by defendant. The witness Gentry had in his testimony stated who were with him in the car he was driving; testified that the car that struck his car *came on them at a tremendous rate of speed;* described the wreckage to his car and the parties thrown out from the compact. He stated, "My wife and other daughter, Mrs. Baker, were in the car at the time the machine was struck." He was then asked: "Q. You may state whether or not they were injured by the same compact that killed your daughter, Evelyn." The objection of defendant was overruled and the witness answered: "They were injured at the same time." We think the evidence relevant and competent as tending to show the speed of defendant's car. The case of *S. v. Beam,* 184 N. C., p. 730, cited by defendant, is not applicable to the facts here.

The witness I. T. Chapman, who lived on State Highway No. 15, about 250 or 300 yards from the intersection of Mulberry Street, was at home and heard the crash of two cars, and just before heard a speeding car pass his house going in the direction where the collision occurred. It took him about five minutes—ran most of the way—to get to the wreck. He was asked the following question, which was excepted to:

"Q. You may state about how fast, in your opinion, if you have an opinion satisfactory to yourself, this automobile that you heard pass your house just before the wreck was running at the time it passed your house?" (Provided the jury find from the evidence that this is the same car that caused the wreck.) Defendant objected on the ground the witness says he was in the house behind closed doors; didn't see the car and don't know whose car it was and never saw the car. A. "I am quite sure the car was not running under sixty miles an hour that I heard pass the house." Motion to strike out. (By the court): "Admitted with the qualification heretofore given. It must be found, of course, that this is the car that caused the wreck, otherwise it would not be material." This exception cannot be sustained. If error, it was harmless. Witness after witness testified for the State that they saw the defendant's car along the route, and it was going sixty miles and more an hour. Elton Morgan, who was at the corner of Cabarrus Mill about 200 yards from where the cars crashed, about 50 to 100 yards from where Chapman heard it, said it was going 75 miles an hour. He put it nearer the collision as going 15 miles an hour more than Chapman. Gentry stated not less than 60 miles an hour when it struck his car, *"more like an airplane than an automobile."*

Exception was taken to the testimony of the witness, J. E. Durham, as follows: "A car passed me." Q. "What direction was it (the car) going?" (The court): "Unless he connects it with this car, it would not be competent." A. "I was coming down the highway at the Rowan County line and Chrysler passed me at an unusual rate of speed. I got clean down out of the road when he went by me. It was a sedan. I kept on going down the highway, same direction the Chrysler was going, until I got down to the wreck." Q. "Was the Chrysler car in the wreck a similar car to the one that passed you up on the highway?" A. "It was a Chrysler sedan in the wreck." (The court): "That is a circumstance." "The car that passed me was making about 60 or 65 miles an hour. That was about three-fourths of a mile from the place of the wreck." We think this evidence clearly competent as a circumstance. In fact, all the positive evidence was to the effect that all along the route just before the compact the car defendant was in was going 60 miles an hour and more. These exceptions cannot be sustained.

Exception is taken to the charge: "Now, to start with, the law presumes the defendant is innocent, and before you can convict him of any offense, the burden is upon the State to satisfy you from the evidence beyond a reasonable doubt of his guilt." The ground of the exception is that the court below should have said *from all the evidence,* instead of *from the evidence.* The alleged distinction is without a difference. The humane judge who tried this action in the court below charged the jury, *"Now, to start with, the law presumes the defendant is innocent."* This the court was not bound to give, at least without a prayer for instruction. *S. v. Boswell,* 194 N. C., 260.

The court fully defined reasonable doubt. "A reasonable doubt has been variously defined. It is sometimes said it means that you must be satisfied to a moral certainty of his guilt from the evidence, or that you must be fully satisfied. A reasonable doubt is not defined in law as any set formula. It is sometimes defined as meaning 'fully satisfied or satisfied to a moral certainty.' It may also be said to mean that the jury ought not to convict unless, after a *consideration of all the evidence,* with all the light derived from the argument of counsel and the instruction of the court, their minds are involuntarily led to the conclusion of guilt." It will be noted that the court below charged precisely what defendant complained it did not charge, *after a consideration of all the evidence;* and went further: *all* the light derived from the *argument* of *counsel. Fair in the extreme to defendant.*

Exceptions 9, 10 and 11 were to portions of his Honor's charge upon murder in the second degree. These exceptions have been eliminated by the verdict of the jury, who convicted the defendant of manslaughter only.

In *S. v. Cox,* 153 N. C., p. 638, the defendant was convicted of manslaughter. The court said, at p. 644: "Exceptions 20 and 21 relate only to the question of malice, and as the jury has found the prisoner guilty only of manslaughter, they have become immaterial." *S. v. Worley,* 141 N. C., at p. 768.

Exception 12. The court below charged the jury: "Now you see the fight hinges on this question of guilt or innocence, whether murder in the second degree or manslaughter, which I will reach later, hinges largely upon the question as to whether or not you find that Leonard was driving the car or Vogler was driving the car, or somebody else, first; and, second, as to whether or not if Leonard was not driving the car, the car was being driven under his direction and under his control. If you find that the car was not being driven under his direction and under his control, then, of course, you could not find him guilty of any offense, and unless the State satisfies you from the evidence beyond a reasonable doubt that the car was driven by Leonard or was driven by somebody under the direction or control of Leonard, you could not find him guilty of any offense." This portion of the charge in which the court below submitted to the jury the defendant's theory that the car was not being driven by him or by any one else under his control. The court tells the jury expressly that unless the State satisfied them from the evidence beyond a reasonable doubt that the car was driven by Leonard or was driven by somebody under his control, they must not find him guilty of any offense. We can conceive of no reason why this was not a proper charge. It amounts simply to telling the jury that if they believed the defendant's account of the transaction or had a reasonable doubt as to the State's account of the transaction, they must acquit the defendant.

Exception No. 13. What the court said in full is given, not the excerpt objected to. The part objected to by defendant is in parentheses: "Now the State contends that at any rate, it was an unlawful killing; that this young woman was killed unlawfully, and the State contends that Leonard was the man that did the killing (and if you do not find that he did it through malice, as heretofore defined, implied malice, that you ought to find that he did it unlawfully; that if it was not that dangerous conduct and reckless and wanton conduct that evinced depravity of mind and disregard for human life, that it was that degree of negligence and that degree of misconduct that brought about the death of the deceased and was the direct result of this gross negligence of the defendant to such an extent that he was the cause of her death, and that it was an unlawful death without any mitigating circumstances or excuse, and that therefore you ought to find that he is guilty of manslaughter)." This was a contention. *S. v. Reagan,* 185 N. C., at p. 713; *S. v. Sinodis,* 189 N. C., at p. 571.

The court had theretofore defined manslaughter: "Manslaughter is the unlawful killing of a human being without malice and without any just cause or reasonable excuse. . . . Now, we come to the definition again to manslaughter: Manslaughter is the unlawful and wilful killing of another without malice, express or implied, and without legal justification or excuse, and under given conditions this crime may be established, though the killing be unintentional. When one unlawfully kills as a result of anger suddenly aroused by provocation which the law deems adequate, and the killing is done before sufficient time has elapsed, with passion so aroused to subside and reason to resume her sway, in such instance the anger so aroused is held to displace malice and to reduce the unlawful homicide to the grade of manslaughter. Thus, if two persons fight upon sudden quarrel, and during the progress of the fight one slays his adversary, slays in anger aroused by the combat, this ordinarily will be manslaughter." If defendant desired a fuller and more specific definition of manslaughter, he should have asked for it by proper prayer for instruction. *Davis v. Long,* 189 N. C., at p. 137. The exception cannot be sustained.

The defendant in his brief says: "The crucial point in this case, and the one upon which it largely depends, under the State's theory of the case, and the evidence, is whether the defendant was driving the car himself. There is no evidence nor contention that any one else was driving the car by his direction and authority, and the State hangs its whole case upon its ability to prove that the defendant was himself driving the car at the time of the wreck, in person. We respectfully submit that there was not sufficient evidence on this point to warrant a conviction. When defendant renews his motion to dismiss as of nonsuit at the close of all the evidence, then this second motion must be considered in the light of not merely the evidence which was introduced by the State, but of all the evidence offered at the trial. *S. v. Reagan,* 185 N. C., 710."

This was defendant's exception under C. S., 4643 (civil actions, 567), the refusal of the court below, upon defendant's motion for judgment as in case of nonsuit at the conclusion of the State's evidence, and at the conclusion of all the evidence. The principle contended for in defendant's brief is correct law, but we cannot understand its application in the present action.

All the parties in defendant's car, except defendant, viz., George Vogler, C. W. Davis and Mrs. C. W. Davis, testified that defendant was driving the car. C. W. Davis to the effect that defendant was driving when he could see the lights of Kannapolis, and then he dozed off to sleep, and the next thing he knew "it was like a flash, and the next thing I knew was the next morning in the Concord hospital." Numerous witnesses testified that defendant admitted he was driving the car when the wreck occurred. This was a question of fact this Court has nothing to do with, as heretofore stated. The principle of law in actions of this kind is well stated in *S. v. Rountree,* 181 N. C., 535; *S. v. Trott,* 190 N. C., 674.

In the *Rountree case, supra,* at p. 538, it is said: "The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life. *S. v. Gash,* 177 N. C., 595; *S. v. McIver,* 175 N. C., 761; *S. v. Tankersley,* 172 N. C., 955."

The jury has found that defendant drove the car on State Highway No. 15 that killed the little girl, Evelyn Gentry, some 14 years old. The State's evidence indicated that defendant was under the influence of intoxicating liquor and driving his car at a tremendous rate of speed. When it struck the railroad switch crossing in Kannapolis shortly before the compact with the car the little girl was riding in, defendant's car jumped two or three feet. It was coming like an airplane, 60 to 75 miles an hour. It is undisputed on the record that Rev. C. K. Gentry, father of the little girl, was returning from religious services with his wife, daughter, Mrs. Baker, his grandchild and little Evelyn, who was killed. He was driving carefully. The compact threw Evelyn 50 feet south of the wreckage, *horribly mangled, totally decapitated, broken to pieces.* While the dead girl was on the ground and her father standing there, defendant walked up "and with a drunken leer, thick tongue" had the conversation narrated in the testimony, and admitted he was driving the car, and finished by saying to the dead girl's father, "You are a hell of a preacher, talk like that." The patience of the preacher, under such trying circumstances, is to be commended.

The State's evidence fully warranted the conviction of defendant for manslaughter or more. On the whole record the court below gave defendant everything he was entitled to in law.

The record discloses a fearful tragedy from the use of intoxicating liquor, not only the death of the little girl, but the injury and scars that those in the wreckage will carry to their graves. Punishment has come to the defendant and misfortune and grief to those near him. Surely the wise man was never wiser than when he said of intoxicating liquor: "At the last it biteth like a serpent and stingeth like an adder."

For the reasons given, we find in law

No error.

E. A. EDWARDS ET UX. v. W. T. MEADOWS.

(Filed 29 February, 1928.)

1. Mortgages—Rights and Liabilities of Parties.

Where the purchaser of lands assumes prior encumbrances thereon and takes under a deed warranting an unencumbered title, and mortgages the land back for the payment of the purchase price, and then conveys to the defendant against whom the plaintiff brings action after the lands had been sold under the first mortgage for wrongfully removing a building from the mortgaged premises without his consent: *Held,* the defendant is not a party to the plaintiff's deed and he cannot claim the benefit of the warranty therein, or be thus advantaged by his own tort.

2. Same.

Where a second mortgagee has been damaged by the act of the mortgagor in removing a dwelling from the mortgaged premises, and the lands have been foreclosed by the first mortgagee, the measure of his damages, in his action to recover them, is the value of the building so removed within the amount due and unpaid upon his note secured by his recorded mortgage.

CIVIL ACTION, before *Townsend, Special Judge,* at October Special Term, 1927, of MARTIN.

The plaintiffs, being the owners of a certain lot in the town of Williamston, executed two deeds of trust upon the land to A. R. Dunning, trustee, to secure the payment of certain notes. These notes, at the time of the public sale of the property, were owned by the Martin County Savings and Trust Company. Thereafter the plaintiff sold the property to L. T. Fowden for $4,000, receiving a cash payment of $1,500. It was agreed between the plaintiffs and Fowden that the purchaser Fowden should assume and pay off as a part of the purchase price the aforesaid notes held by the Trust Company, amounting to $500, and this $500 was deducted from the purchase price. To secure the balance then remaining of the purchase price, aggregating $2,000, Fowden executed and delivered to the plaintiffs five notes of $400 each and secured the payment thereof by deed of trust upon said land to A. R. Dunning, trustee. Fowden made certain payments, reducing the $2,000 mortgage to the sum of $1,093.90. Prior to the 26th day of May, 1924, the defendant Meadows, without the knowledge or consent of plaintiffs, moved off the mortgaged premises a dwelling-house situate thereon, and placed said house upon a lot owned by him. Thereafter on the 26th day of May, 1924, Dunning, trustee, upon the request of the Savings and Trust Company, advertised said property and sold it at public auction under the first deed of trust aforesaid. At the sale the naked lot brought $1,000, and the trustee disbursed the proceeds of the sale by paying off the $500 mortgage which, with accrued interest, amounted to $650.16, the taxes due upon the premises and the costs of sale, and paid the surplus, amounting to $243.49, to the plaintiffs. On the date of the sale the balance due plaintiffs on Fowden's mortgage was $1,093.90, and after crediting the $243.49 received by plaintiffs from the trustee, there was a balance due on plaintiffs' mortgage of $850.41. Thereupon the plaintiffs instituted this suit against the defendant for the value of the house which he had unlawfully moved from the premises and which had thus resulted in impairment of the security.

The issues and the answers of the jury thereto were as follows:

1. Did the defendant wrongfully and unlawfully remove the house from the mortgaged premises as alleged? Answer: Yes.

2. What damage, if any, is the plaintiff entitled to recover? Answer: $200.25 and interest.

3. What was the value of the house at the time of removal? Answer: $600.

4. What was the value of the naked lot at the time of the sale under plaintiffs' mortgage to C. H. Godwin? Answer: $1,000.

The record shows the following admission: "It is admitted by the plaintiffs that at the time of the sale of the naked lot there was only due on her mortgage the sum of $1,093.90, and at the time of the sale of the naked lot said lot was worth $1,000. It is admitted that the cost of the sale, including taxes due, amounted to $106.35. It is admitted that the naked lot brought $1,000 at the sale, and that the plaintiff had and received all of said amount except the amount due on the two mortgages given by plaintiffs to C. H. Godwin and the Martin County Savings and Trust Company, which said mortgages were prior, valid and subsisting liens on said property. That said lot was sold by plaintiffs, who warranted same to be free and clear from encumbrances to Fowden, under whom defendant claimed title. It is further admitted that if the amount of prior liens given by plaintiffs should be deducted after giving plaintiff credit for the cost and taxes paid there would only be due on plaintiffs' mortgage the sum of $200.25."

From judgment upon the verdict in favor of plaintiffs for $200.25, they appealed.

Elbert S. Peel, Wheeler Martin and Rupert Pickens for plaintiffs.
A. R. Dunning for defendant.

BROGDEN, J. The judge charged the jury as follows: "I charge you, upon all the evidence, and the admissions of the plaintiffs, that you cannot answer the second issue more than $200.25 and interest. It is admitted that the naked lot was worth $1,000 when sold, and that at that time there was due on the plaintiff's mortgage the sum of $1,093.90, and that two prior mortgages given by the plaintiffs were paid out of the proceeds of the sale, and that the cost of the sale and taxes paid amounted to $106.35 were added to the plaintiff's mortgage, and upon these admissions the court charges you the plaintiffs cannot complain of damages for the amount paid out on account of the two prior mortgages given by them, and you cannot answer the second issue more than $200.25 and interest. The defendant contends that you ought to answer it nothing or some small amount. The measure of damages would be the difference in value of the lot with the house on it and the value of the lot with the house off it, but in no event could she recover more than enough to pay her mortgage. I charge you that if she had given a prior mortgage and afterwards gave a warranty deed, as is admitted, the amount ought to be taken out to pay the prior mortgage, could not be complained of as damages in this case. It is for you to say if she has sustained any damage and how much, bearing in mind the maximum is $200.25 and interest."

The exception to the foregoing instruction is sustained. The defendant was a wrongdoer or *tort-feasor*. The jury found that he had wrongfully and unlawfully removed from the mortgaged premises the dwelling-house which, at the time of removal, was worth $600. Nothing else appearing, the defendant was therefore liable to the plaintiffs for the sum of $600, because the defendant, by his wrongful act, had impaired the plaintiff's security by that amount. Of course the plaintiffs cannot recover more than the amount due on the Fowden mortgage, amounting on the day of the sale to $1,093.90. The plaintiffs have received from the trustee a part of the proceeds of sale in the sum of $243.49, which left a balance of $850.41 due plaintiffs on said mortgage. It is obvious that $600 does not pay an indebtedness of $850.41.

The defendant contends, however, that plaintiffs conveyed the property to Fowden by deed containing a covenant against encumbrances, and it further appearing that there were mortgages on the land at the time, securing an indebtedness of $500, there was a breach of said covenant by the plaintiffs, and hence the sum of $500 with interest and taxes and costs of sale must be credited on plaintiffs' mortgage before resort can be had to the defendant. If this could be done, then the parties agreed that the balance due plaintiffs was $200.25, and the judge so charged the jury. But this cannot be done. The defendant was not a party to the deed from plaintiffs to Fowden, and therefore he had no claim against the plaintiffs for any breach of any covenant in the deed. To adopt the theory of the defendant would in effect permit him to plead as a counterclaim to his liability for his unlawful act, the breach of covenant in a deed to which he was not a party and by which he was not injured, or caused to suffer loss.

Upon the admissions of the parties and the findings of the jury upon the other determinative issues, the second issue is immaterial. The plaintiffs are entitled to judgment for six hundred dollars and interest from 1 June, 1924, and costs.

Modified and affirmed.

J. R. NEWBERN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 29 February, 1928.)

1. **Evidence—On Motion to Nonsuit—Demurrer to the Evidence.**

   Upon defendant's motion as of nonsuit upon the evidence, the evidence is to be taken in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment or inference to be drawn therefrom. C. S., 567.

2. **Telegraphs—Contract with Sender—Claim to be Filed in Sixty Days.**

   The printed stipulation on the back of a telegraph blank upon which a message is written, referred to in the printing on the face thereof, that the telegraph company would not be liable for damages or statutory penalties when the claim therefor is not presented in writing within sixty days after the message is filed with the company for transmission, is reasonable and valid.

3. Same.

Where a telegraph company receives for transmission a telegram ordering a carload of potatoes, and within the sixty days stipulated in the telegraph blank, the company is notified by a letter from the sender of its mistake in its transmission as to the destination of the shipment, and that damages had resulted therefrom: *Held*, sufficient to sustain the action of the sender to recover damages against the company for its negligence.

4. Evidence—Presumptions—Receipt of Mail.

Where a notice has been written and deposited in the United States mail, giving a telegraph company notice of a mistake made by it in the transmission of a message it had accepted for that purpose, it is sufficient evidence that it had been duly received by the company.

APPEAL by plaintiff from *Moore, Special Judge,* at October Special Term, 1927, of PASQUOTANK. Reversed.

This is an action for actionable negligence brought by plaintiff against defendant. The defendant denied negligence and set up (1) the plea of contributory negligence; (2) That the plaintiff failed to present his claim for damages in writing within 60 days after the alleged message was filed for transmission.

The testimony of plaintiff was to the effect that after an exchange of several previous messages, the West Virginia Brokerage Company, on 21 August, 1924, filed with defendant at Huntington, W. Va., a message addressed to plaintiff at Elizabeth City, N. C., reading as follows: "Replying ship Keister Milling Company *Huntington* hundred seventy-five bbl. car branded sweets eight quarter delivered." Said message when delivered by the defendant to plaintiff had a mistake—the word *Wilmington* was substituted for *Huntington.* When plaintiff learned of the error in the message he wired the West Virginia Brokerage Company, on 22 August, "Confirm Keister car sweets advise quick correct shipping instructions." The same day he got a reply to the wire: "Ship car Keister Milling Company C. and O. delivery Norfolk Western Norfolk splitting several people." That he didn't ship until he sent the second wire asking for specific instructions. After receiving the telegram reading *Wilmington,* he had the Western Union to read the telegram to see if Wilmington was right, because the next telegram read "splitting several people." After he had wired and got specific instructions and shipped potatoes, he did not find out that anything was wrong about the shipment until 25 August, 1924. . . . "I didn't ship by C. & O. delivery; I didn't route it C. & O. C. & O. is Chesapeake & Ohio. I disregarded C. & O. delivery for the simple reason I shipped the car order notify. I didn't give it any route. I wired the West Virginia Brokerage Company on 22 August: 'Shipped N. & S. 21312, Routed B. & O., delivery Wilmington, Ohio.' I wrote that wire. I didn't route the car B. & O. delivery. That was the routing the agent advised me the car would take. And I wired the West Virginia Brokerage Company that the car was being routed that way; I disregarded their instructions to ship it C. & O. delivery. I didn't send it C. & O., notwithstanding I had their telegram telling me to ship it C. & O. I gave the agent instructions to ship it C. & O., and he said he could not do it. He gave it B. & O. routing."

On 2 September, 1924, plaintiff wrote to defendant's agent at Elizabeth City the following letter: "This is to advise that we are having disposition made of sweet potatoes in car NS-21312, consigned to Wilmington, Ohio, through error of Western Union, whereas the car should have gone to Huntington, W. Va. All losses sustained and all additional expenses we have had or will have in connection with closing this car we shall expect the Western Union to reimburse us. It is with regret that through error of the Western Union that the wrong shipping instructions were made, as the parties to whom this car was sold was put out by not getting their potatoes, and it has caused us much expense and trouble in disposing of this car. We shall advise you as early as we have returns on this car, and shall expect you to let us have settlement. We are sorry indeed, but we cannot be expected to sustain this loss through an error of your company."

Again, a letter of 25 October, 1924, calling attention to the error of defendant, enclosing bill and showing loss of $652.27. Then again on 31 October, 1924, repeating and winding up the letter: "Trust this information will be what you wish, and that you will insist that prompt settlement be made so that we may make settlement with the grower of these potatoes."

At the close of plaintiff's evidence defendant made a motion for judgment as in case of nonsuit, which was sustained by the court below. Plaintiff excepted, assigned error and appealed to the Supreme Court.

Aydlett & Simpson for plaintiff.
Thompson & Wilson for defendant.

CLARKSON, J. We think the court below was in error in sustaining defendant's motion for judgment as in case of nonsuit, under C. S., 567. On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

We do not repeat or discuss the evidence, as the case goes back to the court below to be tried on the issues arising on the pleadings.

We think the notice given by plaintiff to defendant, in letter of 2 September, 1924, fully ample under the terms of the contract. The Western Union Telegraph Company blank has the following: "Send the following message, subject to the terms on the back hereof, which are hereby agreed to." (Space for telegram.) And on back of telegram: "6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." This stipulation has been held reasonable and valid. See *Waters v. Tel. Co.,* 194 N. C., at p. 196, and authorities cited.

Mr. Justice Holmes, in *Western Union Tel. Co. v. Czizek,* 264 U. S., at p. 285, says: "But here the plaintiff called on Hackett, the general manager at Boise, about 14 February, 1918, as soon as he knew the facts. Directly after he received a letter from Hackett, regretting the occurrence, and enclosing the amount paid by the plaintiff as toll. Three days later the plaintiffs returned the check by letter, saying, 'An acceptance of this check on my part might be construed as a settlement of this matter,' so that defendant then had written notice that a claim was made. There was further communication, and finally, on 18 June, the plaintiff made a formal written demand. We should be unwilling to decide that the action was barred by this clause."

In *Bennett v. Tel. Co.,* 168 N. C., at p. 498-9, it is said: "The object of the sixty days notice, as stated in *Sherrill v. Tel. Co., supra* (109 N. C., 527), is to give the telegraph company notice within sixty days, before its records may be sent off or the memory of its agents becomes indistinct. This letter was sufficient to recall the matter to the attention of the agent at Hamlet, and was mailed within sixty days. *Lytle v. Tel. Co.,* 165 N. C., 504. Such mailing raised the 'presumption that the letter was received, and therefore was duly served.' *Cogdell v. R. R.,* 132 N. C., 855, citing *Bragaw v. Supreme Lodge,* 124 N. C., 154."

In *Bryan v. Tel. Co.,* 133 N. C., at p. 607, it is held: "The third ground that the claim for damages was not presented in sixty days is answered by the fact that the summons was issued and served in sixty days. *Sherrill v. Tel. Co.,* 109 N. C., 527, at p. 532, where it is held, 'the general rule that the commencement of an action is equivalent to a demand applies to cases of this kind.' Thompson on Elec., sec. 256. . . . The service of the summons puts the defendant on inquiry fully as much as filing the complaint." *Mason v. Tel. Co.,* 169 N. C., p. 229.

For the reasons given the judgment of the court below is

Reversed.

J. J. FIELDS v. EQUITABLE LIFE ASSURANCE COMPANY.

(Filed 7 March, 1928.)

1. **Insurance—Disability Clauses—Proof of Disability.**

   Where under a clause in a policy of insurance there is a provision for paying the insured a certain amount monthly in the event the insured furnish proof that a total disability of his earning capacity exists, which he furnishes, and the insurer accepts and pays the stipulated amount, and thereafter upon a certificate of his physician the insurer ceases payment for the cessation of such disability: *Held,* the burden of proof is on the insured to show his continued disability within the terms of the policy.

2. **Insurance—Disability Clauses—Questions for Jury.**

   Where there is conflicting evidence that the insured is permanently disabled under a clause in his policy of insurance paying him a certain monthly sum during disability, the issue is for the jury to determine.

3. **Insurance—Disability Clauses—Physician's Certificate Does Not Bar Insured's Right of Action.**

   The fact that the certificate of a physician given under the requirements of a disability clause in the policy would reasonably cause the insurer to discontinue payment, does not bar the insured's right to show that his disability still exists.

CIVIL ACTION, before *Grady, J.,* at September Term, 1927, of JOHNSTON.

The evidence tended to show that on 9 February, 1921, the defendant issued to the plaintiff a policy of insurance in the sum of $5,000, which said policy contained permanent disability clauses. Said policy, among other clauses, contained the following: "II. TOTAL AND PERMANENT DISABILITY. If the insured before attaining age sixty, provided all premiums have been duly paid and this policy is then in full force and effect, becomes physically or mentally incapacitated to such an extent that he is and will be wholly and presumably permanently unable to engage in any occupation or perform any work for compensation of financial value, and furnishes due proof thereof, and that such disability has then existed for sixty days, the Society, during the continuance of such disability, will waive payment of any premium payable upon this policy after receipt of such proof, and will pay to the insured an income of six hundred dollars a year, payable in monthly installments, subject to the following conditions."

In March, 1922, the plaintiff became sick and filed a claim with the defendant for disability benefits of $50.00 per month. On 3 July, 1922, the defendant, after receiving said proof of disability, allowed the claim of plaintiff and paid him the sum of $50 per month in accordance with the terms of said policy, beginning with 6 December, 1922, and terminating 9 May, 1923. On 25 April, 1923, a blank form, designated as proof of continuance of disability, was filled out by the attending physician of the plaintiff. Question five in said blank form was as follows: "Do you believe that, as the result of a bodily injury or of disease, the insured is now and will be permanently, continuously and wholly prevented thereby from performing any work for remuneration or profit, or from following any gainful occupation?" The attending physician answered said question on said form as follows: "Able to perform light work on farm; not permanently disabled." This proof of disability was received by the defendant on 30 April, 1923. Thereupon the defendant, acting upon the proof, declined to make further payment to the plaintiff and notified him in writing on 6 June, 1923, that the "policy has been restored to a premium paying basis and no further installments will be paid." Thereafter, on 15 September, 1923, the plaintiff instituted this suit against the defendant, alleging and contending that he is wholly and permanently disabled, and therefore entitled to the disability compensation provided in the contract.

At the conclusion of the evidence the trial judge sustained a motion of nonsuit and the plaintiff appealed.

J. Ira Lee, W. H. Massey and Parker & Martin for plaintiff.
W. H. Lyon, Jr., and S. Brown Shepherd for defendant.

BROGDEN, J. The record discloses that the sole question at issue between the parties was whether or not the plaintiff was permanently disabled within the purview of the terms of the policy, on 9 May, 1923, and thereafter at the time of instituting this action.

The plaintiff contended and insisted that the proof of disability submitted by his attending physician to the effect that he was not permanently disabled was not a correct statement of the true facts for the reason that since his first attack in 1922, he had been wholly and permanently disabled thereafter. Furthermore, at the trial the plaintiff offered evidence tending to show that he was permanently disabled, and his physician who furnished the proof of disability on 25 April, 1923, testified that when he used the expression, "not permanently disabled" that he meant that the plaintiff was not confined to his bed. The proof of permanent disability furnished by plaintiff on 25 April, 1923, and his testimony and that of his physician at the trial were conflicting. In such cases the rule of law is thus stated in *Hill v. Ins. Co.*, 150 N. C., p. 1: "The proofs of loss, though not conclusive and irrebuttable by plaintiff, are prima facie true as against him. *Ins. Co. v. Newton*, 22 Wall., Vol. 89, p. 32; *Ins. Co. v. Rodel*, 95 U. S., 232. The burden was upon the plaintiff to show that a statement made in the proofs of loss was erroneous in fact. The plaintiff, having filed them, has vouched for their truth. He must show mistake."

In the *Rodell case, supra,* the policy contained a clause that if the insured should "die by his own hand" the policy would be void. It was conceded that the insured died 5 December, 1873, from the effects of poison administered by his own hand. The beneficiary, however, contended that the insured was insane at the time of taking the poison and denied that he committed suicide within the meaning and intent of the policy. The company contended that the proof of loss itself contained evidence avoiding liability. *Justice Bradley,* writing for the Court, said: "If the proofs also disclosed facts of which the defendant could avail itself as a defense to an action on the policy, this would not derogate from the sufficiency of the proofs as proofs of death. But while the disclosure of such facts might well suggest to the company the propriety of refusing payment and standing suit, it would be no bar to the bringing of a suit; otherwise, no suit could ever be brought until the parties had gone through an extra-judicial investigation resulting favorably to the assured."

Applying these principles to the facts disclosed in the record, we are of the opinion, and so hold, that the question of permanent disability was a question for the jury, and therefore the judgment of nonsuit is

Reversed.

JERRY COX and Wife, LOUISA COX, v. ALBEMARLE DRAINAGE DISTRICT, BEAUFORT COUNTY DRAINAGE DISTRICT, No. 5, and JOHN L. ROPER LUMBER COMPANY.

(Filed 7 March, 1928.)

1. **Drainage Districts—Liabilities and Rights of Parties Under Consent Judgment Made in Its Formation.**

A consent judgment entered in the forming a statutory drainage district with regard to the cutting and maintaining drainage ditches, in connection with ditches to be maintained by owners of the land partly lying within and partly without the district is to be interpreted as the contract of the parties, and binding upon the owners of the land included within the district thus formed.

2. **Same.**

Where by the terms of a consent judgment entered into by the proper authorities of a drainage district being formed with certain owners of land partly lying within and partly without the district, it is set forth that such owners maintain ditches upon their outside lands flowing into those of and within the district, upon certain conditions as to the flowing of the water, and the district is thus formed, other owners of the land may not recover damages to their land against those who have constructed the outside ditches upon their own land, when a different remedy is provided in the consent judgment.

Appeal by plaintiff from *Midyette, J.*, at October Term, 1927, of Beaufort. Affirmed.

There were nine actions, consolidated by consent, brought against defendants as joint *tort-feasors,* alleging damage for flooding plaintiffs' land, sobbing and souring the land, and destroying the crops.

Louisa Cox, the plaintiff, wife of Jerry Cox, is the owner of 53 acres of land situated within the boundaries of Pantego Drainage District. That while said district was in process of being created under chapter 442, Public Laws 1909, C. S., ch. 94, on 1 February, 1910, the following agreement was made a part of the project and set forth in the decree:

"Now, therefore, by consent of all parties to this proceeding and with the approval of the board of viewers, it is admitted and decreed by the court that all lands owned or claimed by said J. L. Roper Lumber Company, by the Manhattan Trust Company and by the Norfolk Southern Railway Company, which are or may be within the boundaries of the proposed drainage district, as described either in the petition or preliminary report heretofore filed be and the same are hereby expressly excluded and eliminated from the said district, and the said J. L. Roper Lumber Company, the Manhattan Trust Company and Norfolk Southern Railway Company, their successors and assigns are declared unnecessary as parties to said proceeding and as to them, but not otherwise, the same is dismissed *upon condition,* however, which by consent is made a condition precedent, as aforesaid, that said J. L. Roper Lumber Company will, at its *own proper cost* and *expense construct* and *hereafter maintain the canal* or *intercepting ditch* extending from Cuckold's Creek north to Station 135-00 (as shown and indicated on the map of the Pantego Drainage District as surveyed in 1909, and prepared under the supervision of the Bureau of Drainage Investigation of the United States Department of Agriculture, a copy of which is herewith filed), and thence running westward with the boundaries of the proposed district as described in the aforesaid preliminary report to Station 589-00, which said canal shall be constructed and so maintained of the width and depth as provided in the map accompanying the map so made under the supervision of said Bureau of Drainage Investigation by J. O. Wright, Supervising Drainage Engineer, a copy of which is also filed herewith, and in accordance with his recommendations as to the size and capacity thereof, *so that it shall be at all times in good serviceable condition for the purposes intended* and so long as the said Pantego Drainage District may be continued and maintained under the law; and upon the further condition that, if at any time the said *intercepting canal shall, through the failure or default of the said J. L. Roper Lumber Company to maintain the same become so impaired or obstructed as to lessen or diminish its carrying capacity 25% or more,* then the commissioners of said drainage district shall serve a written notice to that effect, either upon the president of the said J. L. Roper Lumber Company or upon such other person as may be designated by it under the law upon whom the process may be served, and within sixty days after the receipt of such notice the said company shall proceed to repair the said canal and restore the same to its former capacity according to the original plans so that the same shall be put in good serviceable condition for the purpose intended, and repairs shall be commenced within a reasonable time, and if in case the said company shall fail or neglect within the period of sixty days after the receipt of such notice to begin in *good faith the work of repair upon the intercepting canal,* then the drainage commissioners of said district shall on their part have the right to enter and undertake the said repairs to the extent which may be then actually necessary, and that, in behalf of said district, may recover from said company the amount of money by them necessarily expended in making such repairs, and the amount so necessarily expended by said drainage commissioners in making such repairs shall constitute the measure of damages against the said company, its successors or assigns in case of such default or failure on its part, or their part, and no other or greater damages shall be recoverable on that account."

It is further provided that the Pantego Drainage District shall "construct and maintain" certain canals and the duties "shall be reciprocal." It is further provided that the J. L. Roper Lumber Company and Norfolk & Southern Railway Company lands, originally in the district, can drain their lands into the intercepting canal, and the J. L. Roper Lumber Company lands, contiguous, into Pantego Drainage District canals.

The defendant, J. L. Roper Lumber Company, constructed the intercepting canal some 12 miles in length, and Pantego Drainage District constructed its canals, and both in accordance with the decree.

The other necessary facts will be set forth in the opinion.

Harry McMullan and H. C. Carter for plaintiffs.

S. C. Bragaw and Small, MacLean & Rodman for John L. Roper Lumber Company.

Clarkson, J. The defendant, J. L. Roper Lumber Company, made a motion in the court below for judgment as in case of nonsuit, which was allowed. C. S., 567. Upon the record we think this was correct. The plaintiffs then submitted to judgment as in case of nonsuit against the Albemarle Drainage District, on the ground that if a judgment could be obtained it would be uncollectible on account of insolvency.

The land of the plaintiff, Louisa Cox, is in the Pantego Drainage District. She is bound by the decree made in the proceeding establishing the Pantego Drainage District. It appears that the J. L. Roper Lumber Company has constructed the intercepting canal some twelve miles, and the Pantego Drainage District its canals, both in accordance with the decree. Under the terms of the decree J. L. Roper Lumber Company contracted, at its own proper cost and expense, to "hereafter maintain the canal or intercepting ditch." It is provided in the decree "if at any time the said intercepting canal shall, through failure or default of the said J. L. Roper Lumber Company to maintain the same, become so impaired or obstructed as to lessen or diminish its carrying capacity by 25% or more, then the commissioners of said drainage district shall give certain written notice to J. L. Roper Lumber Company to perform its agreement and, upon failure, the drainage commissioners shall do so and recover the cost in making the repairs. The evidence on the part of plaintiff is plenary as to her land being soured, sobbed and flooded, and crops destroyed, but she is bound by the decree. If for any cause the intercepting canal becomes so impaired or obstructed as to lessen or diminish its carrying capacity by 25% or more, since its construction under the decree, it is the duty of the drainage commissioners to take prompt action and protect plaintiff's land from future damage. If the intercepting canal's carrying capacity is increased 25% or more since its original construction by other canals emptying into it, the obligation is on the J. L. Roper Lumber Company to fulfill its agreement, and dig it deeper and wider, or otherwise comply with its contract so as to relieve this additional burden. The Pantego Drainage District is not bound by any agreement made by J. L. Roper Lumber Company, and the Albemarle Drainage District or any other corporation, person or persons to "appropriate" the intercepting canal for its or their use so as to diminish the carrying capacity of the intercepting canal 25% or more.

In *Distributing Co. v. Carraway,* 189 N. C., p. 423, it is said: "The judgment before us being a 'consent judgment,' is to be construed as if the parties had entered into a written contract, duly signed and delivered, embodying therein the terms of said judgment. *Bunn v. Braswell,* 139 N. C., 135," citing authorities. *Bank v. Mitchell,* 191 N. C., 190; *Lentz v. Lentz,* 194 N. C., 673.

For the reason given, the judgment of the court below is

Affirmed.

J. B. WADDELL ET AL. v. ALEXANDER AYCOCK ET AL.

(Filed 7 March, 1928.)

1. **Wills—Construction—Nature of Estates and Interests Created—Rule in Shelley's Case.**

   A devise of lands to testator's two sons, J. and H., to be equally divided; to the former "to be to him, his heirs and assigns forever"; to the latter, "I lend to him for his use his lifetime, and at his death I devise to his heirs forever": *Held,* the word "heirs," as applied to the devise to H., is construed in its technical sense as carrying the estate to his entire line of heirs and according to the rule in *Shelley's case* H. takes a fee-simple absolute in the lands so devised to him.

2. **Trusts—Constructive Trusts—Grounds Therefor—Parol Trusts.**

   A parol trust cannot be engrafted on an unqualified fee simple with full warranty and covenant deed in favor of the maker in the absence of fraud, mistake, or undue influence.

3. **Same—Mortgages—Equity.**

   Equity will not convert a deed, conveying upon its face an absolute fee-simple title to lands, into a mortgage when it is not shown that the clause of redemption was omitted by reason of fraud, mistake, or undue influence.

4. **Fraud—Pleadings—Sufficiency of Allegations.**

   When fraud is relied on to convert, in equity, a deed which upon its face conveys an absolute fee-simple title to lands into a mortgage, the fraud must be alleged in the pleadings with sufficient certainty and fullness to indicate to the opposing party what he is called upon to answer.

5. **Limitation of Actions—Statute of Limitations—On Equitable Relief for Fraud, Mistake, etc., and to Convert Fee into Mortgage.**

   A suit for equitable relief on the ground of fraud or mistake is barred by the lapse of three years, and one to convert the fee-simple title into a mortgage within ten years after the right of action accrued when the alleged mortgagee is in possession.

6. **Attorney and Client—Offices of Attorney—Duties and Privileges—Supervision of Court.**

   An attorney at law is an officer of the court in the sense that he owes a duty to the public, as well as to his client, and the manner of his exercise of his right to practice is subject to the court's supervisory power.

7. **Trials—Voluntary Nonsuit—On Transmission by Absent Attorney.**

   It is not error for the trial judge to omit or refuse to sign a voluntary judgment as of nonsuit transmitted to him by the attorney of the defendant, or waive the appearance of the attorney in court, for the purpose of the motion.

APPEAL by plaintiffs from *Grady, J.,* at November Term, 1927, of WAYNE. Judgment on the pleadings. Affirmed.

R. L. Ray for plaintiffs.
Dickinson & Freeman for defendants.

ADAMS, J. Upon the face of the pleadings—the complaint, the answer, and the reply—there appear certain undisputed facts. Harris Waddell made a will, the second item of which is in these words: "I give and devise to my grandsons, John Waddell and Henry Waddell, my tract of land lying on the north side of Molton Branch, said to contain 150 acres, to be equally divided, John's to be to him, his heirs and assigns forever, Henry's part I lend to him for his use his lifetime, and at his death I do devise to his heirs forever." Not John's interest, but Henry's, is in controversy. It is manifest that in the devise to Henry the word "heirs" must be construed in its technical sense as carrying the estate to the entire line of heirs; that as used here it is not a word of purchase, but a word of limitation; and that Henry acquired an estate in fee under the rule in *Shelley's case. Nichols v. Gladden,* 117 N. C., 497; *Smith v. Smith,* 173 N. C., 124; *Hartman v. Flynn,* 189 N. C., 452. On 17 January, 1899, apparently after partition, Henry Waddell with the joinder of his wife, executed and delivered to Barnes Aycock a deed in fee simple, with the usual covenants of warranty, conveying 57½ acres of the land he had acquired under the devise. The grantee forthwith entered upon the land and retained undisturbed possession thereof until his death, which occurred in 1926. Immediately after his death the defendants went into possession claiming title to the land as his children and heirs at law. Henry Waddell died 3 May, 1925, and on 12 April, 1927, the plaintiffs as his heirs brought suit to recover the land he had conveyed to the ancestor of the defendants. They base their action upon these allegations: (1) When the deed was executed a parol trust was created for the benefit of the grantor; (2) the deed, though absolute in form, was intended as a mortgage; (3) the statute of limitations did not run against the plaintiffs during the lifetime of Henry Waddell.

1. It may be said with respect to the first of these propositions that while parol trusts are recognized, and under certain conditions are upheld in our jurisprudence, in the absence of fraud, mistake, or undue influence, they cannot be engrafted in favor of the maker upon a warranty deed conveying to the grantee an absolute and unqualified title in fee. *Gaylord v. Gaylord,* 150 N. C., 222; *Tire Co. v. Lester,* 192 N. C., 642.

2. An answer to the plaintiffs' second position is given in *Norris v. McLam,* 104 N. C., 159, and in cases subsequently decided maintaining the principle that to convert a deed absolute on its face into a mortgage it must be shown that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue influence or advantage. *Green v.*

Sherrod, 105 N. C., 197; *Sprague v. Bond,* 115 N. C., 530; *Frazier v. Frazier,* 129 N. C., 30. In *Fuller v. Jenkins,* 130 N. C., 554, it was held that an agreement between grantor and grantee, made at the time a deed was delivered, that it should operate as a security for debt was sufficient to convert it into a mortgage; but this conclusion was subsequently disapproved in *Newton v. Clark,* 174 N. C., 393, and *Williamson v. Rabon,* 177 N. C., 302. The only averment of fraud is that of "fraud in deceit of Barnes Aycock practiced on plaintiffs' ancestor," and this is fatally defective. Fraud must be alleged with sufficient certainty and fullness to indicate to the opposing party what he is called upon to answer. *Mottu v. Davis,* 151 N. C., 237; *Marshall v. Dicks,* 175 N. C., 38; *Galloway v. Goolsby,* 176 N. C., 635; *Evans v. Davis,* 186 N. C., 41. Nor under the admitted facts is the allegation as to "the mutual mistake of the draftsman" sufficient to impeach the judgment.

3. The plaintiffs were likewise in error as to the running of the statute of limitations. The father of the defendants, the grantee in the deed, had possession of the land in controversy from 1899 to 1926, and the defendants have since held uninterrupted possession. This is admitted by the plaintiffs, but they say that the possession of the defendants was not adverse for the reason that Henry Waddell acquired only a life estate under the will and that during his lifetime the statute did not run against them as remaindermen. This is an erroneous interpretation of the devise, and such an error cannot affect the character of the defendants' possession. A suit for relief on the ground of fraud or mistake is barred by the lapse of three years, and a suit to redeem a mortgage, when the mortgagee is in possession, must be instituted within ten years after the right of action accrued. It is alleged in the complaint that the debt was payable at any time, or in effect that it was payable on demand; so in any event the plaintiffs are not entitled to the relief demanded.

We have pointed out the appellants' allegations for the purpose of showing that their claim is not meritorious; but they now assail the judgment on another ground. They except because the trial judge did not permit them to take a voluntary nonsuit.

The attorney who represented the plaintiffs did not attend the term of court at which the judgment was rendered. He "advised" the presiding judge "that it was impossible to try the case," but afterwards received information that a continuance would not be granted. He then prepared a judgment of nonsuit and mailed it to the judge requesting that it be signed. It was not signed, and upon this ground only the plaintiffs prosecute their appeal. Waiving the contention that upon the allegations and admissions in the pleadings the defendants were entitled to affirmative relief of which they could not be deprived by a voluntary nonsuit, we are unable to discover any error in the refusal to sign the judgment tendered. While an attorney is not a public officer in the constitutional or statutory sense, he is an officer of the court, charged with the performance of an obligation to the public no less significant than his obligation to his client. His right to practice law is a privilege, not a natural right; and the manner in which the privilege is exercised is subject to the supervisory power of the court. For this reason he is expected to be present when he undertakes to represent his client in term, and if he is not, the court is under no obligation to waive his presence. The judgment is

Affirmed.

PAUL HILL AND GUS CAMOS v. J. F. DAVENPORT, BLANCHE DAVENPORT, HIS WIFE, AND NICK CARTOS.

(Filed 7 March, 1928.)

Contracts—Requisites and Validity—Contracts in Restraint of Trade.

A contract for the sale of a cafe or cafeteria, in a town, and the good will of the business for a period of five years does not affect the interest of the public or fall within the terms of our statute so as to prevent unlawful trusts or combinations in restraint of trade. C. S., 2563.

APPEAL by defendant, Cartos, from *Grady, J.*, at January Term, 1928, of PITT. Affirmed.

J. C. Lanier for appellees.
Albion Dunn and Peter R. Hines for appellant.

ADAMS, J. Mrs. Davenport, the *feme* defendant, owns a building in the town of Greenville, which prior to the beginning of this action had been used as a cafeteria. On 30 July, 1927, she and her husband, a codefendant, executed a written instrument by the terms of which for value they sold to the plaintiffs their good will in the business and agreed neither to lease the building for use as a cafe or cafeteria "nor to permit it to be used by themselves or others as a cafe, cafeteria, or restaurant, or for other eating purposes for a period of five years, beginning 1 August, 1927." On 27 December, 1927, J. F. Davenport undertook to lease the premises to Nick Cartos for a term of five years by a written agreement containing this provision: "This lease is made to the party of the second part with the full understanding that he may engage in and carry on any kind of (legal) business he may desire to engage in with exception of cafe and cafeteria business; that is to say that he may engage in merchandise, groceries, lunch counter, hot dogs, and any and all businesses with the specific exception of the cafe and cafeteria business."

The plaintiffs brought suit to enjoin the defendants from using the building in violation or disregard of the agreement they had made with Mrs. Davenport and her husband, and specifically alleged that Cartos had knowledge of this agreement at the time he made the purported contract with J. F. Davenport. They alleged in addition that each of the defendants is insolvent and unable to respond in damages. A temporary restraining order was issued which was afterwards continued to the hearing for the determination of issues of fact joined upon the pleadings. The appellant excepted and appealed, and he now presents the single question whether the contract between the plaintiffs and Mrs. Davenport and her husband is unenforceable as being contrary to public policy or a combination in restraint of trade.

Chapter 53 of the Consolidated Statutes deals with monopolies and trusts. It declares to be illegal every contract, combination, or conspiracy in restraint of trade or commerce and condemns the several acts particularly defined in section 2563; but in subsection 6 there is a provision which has immediate bearing upon the question raised by the appeal: "Nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: *Provided,* such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter."

In *Mar-Hof Co. v. Rosenbacker,* 176 N. C., 330, it is said that although at common law agreements in restraint of trade were held void as being against public policy, this position has been modified until it has come to be the generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable consideration, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." The agreement in question is to be interpreted in the light of this principle, and so interpreted it is within the class of contracts in which the standard of reason is the measure to be used in determining whether they are forbidden by the law. That is, the business of the promisee will be protected if protection can be given without detriment to the public. "If it be greater than is required for the protection of the promise, the agreement is unreasonable and void. If it is a reasonable limit in time and space, the current of decision is that the agreement is reasonable and will be upheld." *Faust v. Rohr,* 166 N. C., 187. Tested by this standard the assailed contract is not void, but enforceable. *Bradshaw v. Millikin,* 173 N. C., 432; *Sea Food Co. v. Way,* 169 N. C., 679; *Wooten v. Harris,* 153 N. C., 43; *Anders v.*

Gardner, 151 N. C., 604; *Hauser v. Harding,* 126 N. C., 295; *Cowan v. Fairbrother,* 118 N. C., 406. The decisions in *Shute v. Shute,* 176 N. C., 462, and in *Culp v. Love,* 127 N. C., 457, rest upon a different principle: in each of these cases the contract contemplated a division of territory from which patronage was to come and to this extent to suppress and stifle competition. The judgment is

Affirmed.

FLORA REEL, ADMINISTRATRIX OF W. R. REEL, DECEASED, v. T. J. BOYD.

(Filed 7 March, 1928.)

1. **Appearance—General Appearance—What Constitutes.**

An appearance for the purpose of filing a demurrer to the complaint is a general appearance to its merits and confers jurisdiction by waiving a proper service of summons. C. S., 490.

2. **Pleadings—Demurrer—Nature of Grounds.**

To sustain a demurrer to the complaint for misjoinder of parties and causes of action the defectiveness complained of must appear upon the face of the complaint to which the objections are made.

3. **Pleadings—Demurrer—"Speaking Demurrer."**

A demurrer that depends exclusively upon its own material allegations to establish a vital defect in the pleadings objected to is bad as a "speaking demurrer."

4. **Appeal and Error—Review—Motion for Additional Parties in Supreme Court.**

Where an order sustaining defendant's demurrer to the complaint is reversed on appeal, plaintiff's motion for new parties to be made to the action will not be allowed in the Supreme Court, but the plaintiff will not be prejudiced in his right to make the motion in the Superior Court.

APPEAL by plaintiff from *Harris, J.,* at November Term, 1927, of PAMLICO. Reversed.

From judgment sustaining defendant's demurrer to the complaint, and dismissing the action, plaintiff appealed to the Supreme Court.

Z. V. Rawls and D. L. Ward for plaintiff.
F. C. Brinson for defendant.

CONNOR, J. Defendant demurred to the complaint for that summons had not been served within ten days after it was issued, and that no alias or pluries summons had been issued in the action. The demurrer cannot be sustained upon this ground. Defendant by his general appearance in the action waived all defects with respect to service of summons.

The statute provides that a voluntary appearance by a defendant is equivalent to personal service of summons. C. S., 490. An appearance for the purpose of filing a demurrer to the complaint is a voluntary, general appearance, and the court in which the action was brought thereby acquires jurisdiction of the defendant.

Defendant demurred upon the further ground that there is a defect of parties plaintiff, upon the facts alleged in the demurrer. It does not appear upon the face of the complaint that there is any defect of parties. Upon the facts alleged in the complaint, plaintiff has a cause of action against the defendant upon which she may alone recover. It is only where a defect of parties is apparent on the face of the complaint that objection can be taken thereto by demurrer. Where there is no defect of parties upon the allegations of the complaint, objection must be made by answer. *Styers v. Alspaugh,* 118 N. C., 630. The demurrer filed in the instant case is what is called "a speaking demurrer," and should have been overruled. A demurrer which is dependent upon allegations therein, or which attempts to sustain itself is bad. *S. v. McCanless,* 193 N. C., 200; *Latham v. Highway Commission,* 185 N. C., 134.

Plaintiff's motion in this Court that certain persons be made parties plaintiff is denied. Upon defendant's filing an answer in the Superior Court plaintiff may renew her motion to make additional parties plaintiff. The motion will then be heard and considered without prejudice from the denial of her motion in this Court, or of any motion she may have made heretofore in the Superior Court. There is error in the judgment sustaining the demurrer and dismissing the action. The judgment is

Reversed.

J. H. MONGER v. R. B. LUTTERLOH AND P. K. SCHULER, PARTNERS TRADING AS THE LUTTERLOH-SCHULER COMPANY.

(Filed 7 March, 1928.)

1. **Landlord and Tenant—Leases—Surrender by Operation of Law.**

Where a lessee wrongfully breaches his contract by failing to enter and take possession under a lease on a building especially constructed for him, and the lessor, with the intent to diminish the damage, rightfully reënters the premises and rents it to another, he acts in trust for them both, and there is no surrender of the lease by operation of law, and the lessee is liable for damages.

2. **Landlord and Tenant—Leases—Measure of Damage in Action for Breach.**

The measure of damages in an action for the wrongful breach of a contract of lease is the difference, if any, between the contract price and the fair rental value for the term of the lease.

3. **Landlord and Tenant—Leases—Burden of Proof of Possibility of Minimizing the Damage.**

Where the lessee has wrongfully breached his contract of lease, and the lessor brings his action for the resulting damages based upon the rental value as fixed by the lease, the burden is on the defendant to show that in the exercise of good business prudence the lessor could have leased to another and minimized the damages, and the amount thereof.

4. **Landlord and Tenant—Leases—Surrender by Operation of Law—Presumptions.**

Where a lessee wrongfully refuses to take possession of leased realty, and the lessor rightfully reënters and leases to another, there is a presumption of law that the lessee surrenders the property and that the lessor accepts the surrender; but this presumption is rebuttable by evidence of the intent of the parties as expressed in the lease, and by their words and acts.

5. **Landlord and Tenant—Leases—Termination in General.**

A written contract of lease of lands will ordinarily be construed to remain in force until it is rescinded by the mutual consent of the parties, or until the party claiming under it does some act inconsistent with the duty imposed on him by the agreement that amounts in law to a surrender on his part, and an acceptance of such surrender by the other party.

6. **Landlord and Tenant—Leases—Statutes.**

The forfeiture implied by C. S., 2343, upon failure to pay rent within ten days after demand where a definite time is fixed for the payment of a stipulated rent, is for the benefit of the lessor, and to be declared only at his application, and does not apply to the facts of this case.

7. **Records—Agreement of Record.**

The question of whether the lessor is required to notify his lessee that he has reëntered the leased premises after the lessee's wrongful breach, in order to minimize the damages, does not arise in the present action, under an agreement appearing of record, that the damages, if any, should be assessed to the termination of the contract period.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1927, of LEE.

Civil action by lessor to recover damages from lessee for an alleged wrongful breach of a rental contract, in words and figures as follows, to wit:

"20 Feb., 1926. The Schuler-Lutterloh Company and J. H. Monger hereby agree: That J. H. Monger is to build a garage for Schuler-Lutterloh Company at once. The rent to be $150.00 per month for a term of 2 years.

"LUTTERLOH-SCHULER MOTOR COMPANY.
"Per P. K. Schuler, President.
J. H. MONGER.

"2/20/26."

There was evidence tending to show that the plaintiff, in accordance with this agreement, constructed a garage and salesroom in the town of Sanford, especially designed for showing Chrysler cars, as desired by defendants, and duly tendered same for occupancy during April or May, 1926.

The jury found, by consent, that the defendants had wrongfully failed and refused to accept plaintiff's building and pay rent for same as agreed.

Six months thereafter, when it appeared certain that the "defendants were not going to occupy the building," plaintiff remodeled same at considerable expense and leased it to other parties.

There is no allegation of a surrender of the premises by the defendants and an acceptance of such surrender by the plaintiff; nor is there any plea of a cancellation or rescission of the contract. No evidence was offered by the defendants, and the record contains the following stipulation: "It was agreed in open court that the damages in this case should be assessed up to the end of the contract, and defendants waived any rights that they might have because the suit was prematurely brought. 1 November, 1926, was agreed upon as the date upon which the plaintiff's damages for the second remodeling of the building should be deemed to have accrued. These agreements were made for the purpose of this trial only."

The trial court held that as the plaintiff reëntered and took possession of the demised premises during the month of September, 1926, he could recover only such rent as had accrued under the contract up to that time. From the verdict rendered in accordance with this instruction, and judgment entered thereon, plaintiff appeals, assigning errors.

A. A. F. Seawell and Hoyle & Hoyle for plaintiff.
Dye & Clark for defendants.

STACY, C. J. It was conceded on the hearing that the defendants had wrongfully breached the rental contract, and that damages should be assessed up to the end of the term. There is no allegation of a surrender of the demised premises by the defendants and an acceptance of such surrender by the plaintiff. Nor is there any plea of a cancellation or rescission of the lease. In this state of the record, we think the trial court erred in limiting the damages to six months' rent under the contract.

In the absence of a surrender and acceptance, an eviction, or a release, and when no stipulation controlling the matter is to be found in the agreement of the parties, ordinarily the measure of damages for the wrongful breach of a rental contract and abandonment of the demised premises, or refusal to enter, on the part of the lessee, is the difference, if any, between the rent reserved in the contract and the rent received from another letting, or the fair rental value where the lessor reënters and uses the premises for the benefit of the lessee and on his account without effecting a surrender or terminating the lease. *Scheelky v. Koch,* 119 N. C., 80, 25 S. E., 713; *Everett v. Williamson,* 107 N. C., 204, 12 S. E., 187; *Brewington v. Loughran,* 183 N. C., 558, 112 S. E., 257; *Torrans v. Stricklin,* 52 N. C., 50. This, we think, is the rationale of our decisions on the subject, when viewed in their entirety, as well as of the best considered cases elsewhere. Note 3 A. L. R., 1080.

It is to the interest of the tenant that the premises should be occupied, rather than stand idle. If the landlord relet at the same rent, the tenant is entirely relieved; if, at less, he is liable only for the difference. *Auer v. Penn.,* 99 Pa. St., 370, 44 Am. Rep., 114.

True, it is said in a number of cases on the subject that when the landlord reënters and resumes the beneficial use and enjoyment of the premises, or relets, as a general rule, an acceptance of the surrender of the tenement is presumed, or effected by operation of law, and he thereby terminates the lease in so far as his right to recover subsequently accruing rent is concerned. *Dennis v. Miller,* 68 N. J. L., 320, 53 Atl., 394; *Hart v. Pratt,* 19 Wash., 560, 53 Pac., 711; Notes, 18 A. L. R., 957, and 3 A. L. R., 1080; 16 R. C. L., 1152. But this is not an irrebuttable presumption and in no event would it affect the tenant's liability for rent already accrued. *Schuisler v. Ames,* 16 Ala., 73, 50 Am. Dec., 168. Nor will a surrender be implied against the intent of the parties, as manifested by their acts. *Murrill v. Palmer,* 164 N. C., 50, 80 S. E., 55; *Coe v. Hobby,* 72 N. Y., 141, 28 Am. Rep., 120; *Smith v. Hunt,* 32 R. I., 326, 79 Atl., 826, Ann. Cas., 1912 D, 971, 35 L. R. A. (N. S.), 1132, and note. A surrender, to be effectual, must be accepted by the lessor. *Auer v. Penn., supra.* And where it appears, as here, that no actual acceptance of the surrender was intended, or made, the tenant may still be held liable for his admittedly wrongful breach of the contract. Note, 14 Ann. Cas., 1088; 16 R. C. L., 969 *et seq.*

Mr. McAdam in his work on the subject of Landlord and Tenant states the general rule as follows: "When a tenant abandons premises, and returns the keys to the landlord, the latter may accept the keys as a surrender of possession, thereby determining the tenant's estate, and relet the premises on his own account, or he may accept the keys and resume possession conditionally by notifying the tenant or other person returning the keys that he will accept the keys but not the premises, and relet them on the tenant's account, in which case the tenant may be held for any loss in rent caused by his abandonment and the subsequent reletting." 2 McAdam, Landlord and Tenant (3 ed.), 1283. See, also, *Hayes v. Goldman,* 71 Ark., 251, 72 S. W., 563; *Brown v. Cairns,* 63 Kan., 584, 66 Pac., 639.

Ordinarily it may be said that a contract is considered to remain in force until it is rescinded by mutual consent, or until the party claiming under it does some act, inconsistent with the duty imposed upon him by the agreement, which amounts to an abandonment of it on his part. *Dula v. Cowles,* 52 N. C., 293; *Hutchins v. Hodges,* 98 N. C., 404, 4 S. E., 46. See, also, *Willis v. Branch,* 94 N. C., 142.

It ought not to be held that a landlord cannot, in any event, enter and relet or make use of the abandoned premises without effecting a surrender as a matter of law, for, in many cases, to suffer the premises to remain vacant during the term would prove more costly or injurious to the owner than to lose the entire rent; and, if the lessor is not permitted to enter and relet or use the property in any way, without effecting a surrender, or terminating the lease, the tenant could thus, through a wrong, force a termination, by simply abandoning the premises, or compel the landlord to elect between the lesser and greater of two losses. 16 R. C. L., 971. This would be to sanction the doctrine that might makes right.

Because the good old rule
Sufficeth them—the simple plan,
That they should take who have the power,
And they should keep who can.—*Wordsworth.*

But such, we apprehend, is not the law. *Rouse v. Kinston,* 188 N. C., 1, 123 S. E., 482. When a tenant wrongfully abandons the demised premises before the expiration of the time for which they are leased, or refuses to enter after executing a binding contract to do so, it is but meet that the owner should be permitted to take charge of the premises, relet or use them for the benefit of the tenant, and thus minimize his own loss and at the same time reduce the amount of the lessee's liability. *Murrill v. Palmer, supra; Holton v. Andrews,* 151 N. C., 340, 66 S. E., 212; *Scheelky v. Koch, supra; Auer v. Hoffman,* 132 Wis., 620, 112 N. W., 1090; *Levy v. Burkstrom,* 191 Ill. App., 478; 36 C. J., 340. See, also, valuable note, North Carolina Law Review, December, 1927, p. 68.

As to whether the landlord must notify the tenant, in order to prevent a surrender by operation of law, that the reëntry is for the benefit of the latter, to be used or relet on his account, as held in a number of jurisdictions, does not arise on the present record, because it "was agreed in open court that damages should be assessed up to the end of the contract."

When a party breaches his contract without any valid excuse, the courts are not inclined to permit him to prescribe the rights of the innocent party, but their chief concern is in making the plaintiff whole and securing to him his rights under the contract. *Construction Co. v. Wright,* 189 N. C., 456, 127 S. E., 580. Nevertheless, it is a well established rule in this jurisdiction that one who is injured in his person or property by the wrongful act or negligent default of another, is usually required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense, and ordinarily he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Mills v. McRae,* 187 N. C., 707, 122 S. E., 762; *Adv. Co. v. Warehouse Co.,* 186 N. C., 197, 119 S. E., 196.

"The general principle is fully recognized with us that, in case of contract broken, or tort committed, the injured party should do what reasonable care and business prudence require to minimize the loss." *Hoke, J.,* in *Yowmans v. Hendersonville,* 175 N. C., 574, 96 S. E., 45.

In a case like the present, we think the landlord should be permitted, if not required, in furtherance of this salutary rule, to do what reasonable prudence and ordinary business sagacity dictate, without necessarily working a surrender of the premises by operation of law. Indeed, it might well be said that such was reasonably within the minds of the parties at the time of the making of the contract, though no provision with respect to reëntry is inserted therein, for it is familiar learning that the general law of the State, in force at the time of the execution of a contract, enters into and becomes as much a part of the contract as if it were expressly referred to or incorporated in its terms. *House v. Parker,* 181 N. C., 40, 106 S. E., 137; *Hughes v. Lassiter,* 193 N. C., 651, 137 S. E., 806.

The rule is too firmly embedded in our jurisprudence to need repeating, that ordinarily the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance, and which was reasonably within the minds of the parties at the time of its making, including such special damages as may be said to arise directly from circumstances existent to the knowledge of the parties, and with reference to which the contract was made, is the measure of damages for the breach of said contract. *Causey v. Davis,* 185 N. C., 155, 116 S. E., 401. Such was the rule laid down in the celebrated case of *Hadley v. Baxendale,* 9 Exch., 341, and this case has been consistently followed by us. *Iron Works Co. v. Cotton Oil Co.,* 192 N. C., 442, 135 S. E., 343; *Builders v. Gadd,* 183 N. C., 447, 111 S. E., 771; *Cary v. Harris,* 178 N. C., 624, 101 S. E., 486; *Peanut Co. v. R. R.,* 155 N. C., 148, 71 S. E., 71; *Coles v. Lumber Co.,* 150 N. C., 183, 63 S. E., 736.

The party charged with responsibility for breach of the contract has the burden of showing matters in mitigation of damages; for in the absence of such proof, nothing else appearing, save the wrongful breach of the agreement, prima facie the plaintiff would be entitled to recover the amount fixed by the terms of the lease. *Construction Co. v. Wright, supra; Mills v. McRae, supra; Smith v. Lumber Co.,* 142 N. C., 26, 54 S. E., 788; *Hendrickson v. Anderson,* 50 N. C., 246; *Beissel v. Elevator Co.,* 102 Minn., 229, 113 N. W., 575; *Milage v. Woodward,* 186 N. Y., 252, 78 N. E., 873.

Authoritative decisions are to the effect that if the tenant wrongfully abandon the premises, and the landlord reënter under a provision of the lease permitting or requiring him to do so, it is his duty to use reasonable diligence to find a new tenant, or otherwise to do what reasonable prudence requires, in order to lessen his damages. *Marling v. Allison,* 213 Ill. App., 224; *Bradbury v. Higginson,* 162 Cal., 602, 123 Pac., 797; *Walsh v. Shinner,* 20 Fed. (2d), 586.

By the rental value, for which the lessor must account when he reënters and makes use of the premises without accepting a surrender or terminating the lease, is meant the fair market value, to be ascertained by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the property may be determined. *Brewington v. Loughran, supra,* and cases there cited.

Speaking to the subject generally, in *Smith v. Hunt, supra, Parkhurst, J.,* delivering the opinion of the Court, says: "The relation of landlord and tenant cannot be determined except by the expiration of the lease, where there is a lease for a fixed term, or, in case of a tenancy from year to year or from month to month, by notice given in accordance with the statutory requirements, except by the surrender of the premises by the tenant and the acceptance of such surrender by the landlord. Whether or not there has been such acceptance or surrender is to be determined by the intention of the parties. This intention is to be determined by their acts and words (citing authorities). In case of abandonment of leased premises by a tenant, it is the landlord's right to enter upon the premises and do such work as is necessary for the protection of the property, and entrance for such purpose and the performance of such work will not convert a mere abandonment by the tenant into a surrender and an acceptance thereof (citing authorities). It is also held that the resumption of possession by the landlord, and the making of general repairs before the expiration of the term, is not conclusive evidence of an acceptance of a surrender, but is entirely consistent with a distinct refusal."

In *Breuckmann v. Twibill,* 89 Pa. St., 58, the facts in the case showed that, after abandonment by the tenant and during the time for which rent was claimed, "the plaintiff immediately took possession of said premises and proceeded to repair the house, by building a new bathroom, a new porch, putting in a new range, and making general repairs, such as could not have been done while the house was occupied by a tenant; deponent saw the house repeatedly during the time for which rent is claimed in the suit, and plaintiff was in possession all that time, and said repairs were going on for the greater part of that time." Upon this state of facts the court in its opinion says: "The plaintiff in error in his affidavit of defense very carefully avoided alleging that there was a surrender of the lease accepted by the landlord. Certain facts are averred which, standing by themselves, would be evidence from which a jury might infer a surrender, but yet entirely consistent with a distinct refusal. Taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay the rent."

When demised premises are abandoned by the tenant, and the landlord accepts a surrender, voluntarily, or by operation of law, the lease is at an end, and, of course, he cannot recover for rent which would have accrued thereafter under the contract. *Everett v. Williamson, supra.*

It is provided by C. S., 2343, that in all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on the lessee for all past due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease. But this implied forfeiture provided by the statute, we apprehend, is for the benefit of the lessor, and is to be declared and enforced only at his option. *Ryan v. Reynolds,* 190 N. C., 563, 130 S. E., 156.

After the execution of a valid lease, the rights of the landlord are practically the same whether the tenant refuse to take possession, or enter and thereafter abandon the premises before the end of the term. Note, 40 A. L. R., p. 197.

For the error, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

MARY ALICE WOMBLE, ADMINISTRATRIX, v. J. C. LEIGH.

(Filed 7 March, 1928.)

1. **Landlord and Tenant—Leases—Measure of Damage in Action for Breach.**

   Where the lessee of a hotel has wrongfully breached the terms of the lease, and the lessor has rightfully reëntered for the purpose of diminishing the damage thus caused, and is entitled to recover them in his action, the rule of recovery is the rental value for the unexpired term as fixed by the contract, diminished by the fair rental value in the open market.

2. **Landlord and Tenant—Leases—Instruction in Action for Breach.**

   Where the lessor has rightfully reëntered the leased premises and is entitled to recover damages from the lessee in his action, an instruction that diminishes the damages to the extent the lessor, in possession and operating the same, should reasonably have received in the exercise of good business judgment, is reversible on appeal.

APPEAL by defendant from *Grady, J.*, at September Term, 1927, of LEE.

Civil action to recover damages for an alleged wrongful breach of a rental contract.

On 18 November, 1921, D. C. Lawrence, owner of the "Sanford Hotel," leased said hostelry to Gus Womble for a period of ten years at an annual rental of $4,000, payable during said term every thirty days in twelve equal installments each year. On the same day Gus Womble transferred and assigned his lease, or sublet the premises, to J. C. Leigh for the same term at an annual rental of $6,000, payable monthly in advance in twelve equal installments each year, and took from Leigh a chattel mortgage, approved by D. C. Lawrence, on the furniture and fixtures of said hotel to secure the payment of the "rent reserved in the lease from Lawrence to Womble."

The defendant entered into possession of the premises and duly performed his contract up to 20 March, 1926, when he defaulted in the payment of his rent and has paid nothing since that date. In the meantime Gus Womble died and his widow, Mary Alice Womble, duly qualified as administratrix of his estate.

After repeated offers on the part of Leigh to surrender the premises and as many refusals by Mrs. Womble to accept same, the defendant finally, on 24 June, 1926, abandoned the property, with the statement to plaintiff's counsel "that he was going to lock the door and walk out; that Mrs. Womble could do what she pleased; that she couldn't get anything out of her contract, as he was going into bankruptcy." With notice to the defendant that she would not release him from his contract, Mrs. Womble took possession of the premises as soon as they were abandoned, in order to meet the liability of the defendant and herself to the owner, and on the same day instituted this action to recover damages for the defendant's alleged wrongful breach of his contract.

Upon denial of liability and issues joined, but with no evidence offered by the defendant, the jury returned the following verdict:

"1. Did the defendant lease the Sanford Hotel from Gus Womble for the period of ten years from and after 18 November, 1921, at an annual rental of $6,000 to be paid in monthly installments of $500 per month in advance, as alleged in the complaint? Answer: Yes (by consent).

"2. If so, did the defendant wrongfully abandon said premises and breach his contract of rental on 24 June, 1926, as alleged in the complaint? Answer: Yes.

"3. Did the defendant fail and refuse to pay the rents for the months of March, April, May and June, 1926, as alleged? Answer: Yes (by consent).

"4. What amount of rents is the defendant indebted to the plaintiff for said months of March, April, May and June, 1926? Answer: Seventeen hundred dollars ($1,700) (by consent).

"5. What damages is the plaintiff entitled to recover of the defendant by reason of said breach of contract? Answer: $38,500."

After reducing the verdict as to the fifth issue from $38,500 to $25,000, because the plaintiff had only asked for the reduced amount, there was a judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

Williams & Williams, Seawell & McPherson and Hoyle & Hoyle for plaintiff.

Gavin & Teague, Gibbons & LeGrand and Varser, Lawrence, Proctor & McIntyre for defendant.

STACY, C. J. Under the principles announced in *Monger v. Lutterloh, ante,* 274, in which the opinion was written with a view to the facts of the present case also, as the two cases were argued the same day and present identical questions, a new trial must be awarded for error in the following instruction to the jury:

"If she is entitled to recover at all, she is entitled to recover out of him (defendant) the present value, present lump sum of money which would be worth $38,500, payable in monthly installments of five hundred dollars per month, running from this period up to November, 1931, that is to say, she would be entitled to a sum of money, which if paid now in cash, would amount to $38,500, payable in monthly installments of five hundred dollars each, and from that sum of money should be deducted whatever amount she, herself, would realize from the use of the property by good husbandry and by the exercise of reasonable care and reasonable judgment."

This instruction erroneously states the rule for the admeasurement of damages, in that, the plaintiff is charged in diminution with only such sum as she could have realized from the use of the property by good husbandry, whereas the correct amount to be deducted from the rent reserved in the contract, when the plaintiff reënters for the benefit of the lessee and on his account, without accepting a surrender or terminating the lease, is the fair rental value of the premises for the remainder of the term. The instruction also contains an error in calculation. We cannot say that these errors were cured in the reduction of the verdict on the fifth issue.

There are other exceptions appearing on the record, but as they are not likely to arise on another hearing, we shall not consider them now.

New trial.

C. W. LACY v. STATE OF NORTH CAROLINA.

(Filed 7 March, 1928.)

1. **Courts—Supreme Court—Jurisdiction in General.**

   The general jurisdiction given to the Supreme Court under the provisions of our Constitution, Art. IV, sec. 8, is a reviewal of the lower courts on matters of law and legal inference, with the power to review questions of fact in certain instances in matters of purely equitable nature, and to prescribe the rules of practice and procedure in the lower courts when not in conflict with rules prescribed by the General Assembly, Art. IV, sec. 12. C. S., 1421.

2. **Constitutional Law—Distribution of Governmental Powers and Functions—Legislative Powers.**

   The General Assembly is without power to prescribe rules of practice or procedure for the Supreme Court.

3. **Courts—Supreme Court—Jurisdiction of Claims Against the State.**

   The Supreme Court in the exercise of its recommendatory original jurisdiction to hear claims against the State, Art. IV, sec. 9, will dismiss any action brought against the State where the sole issue is one of fact.

4. **Highways—State Highway Commission—Actions Against for Breach of Contract.**

   A claim against the State Highway Commission for damages arising from an alleged breach of contract in the building of a State highway is a claim against the State, but when the only issues presented therein are ones of fact, the Supreme Court will not exercise its recommendatory original jurisdiction, and the action will be dismissed.

5. Same.

A provision in the contract made by the State Highway Commission for the construction of a State highway that all disputes and misunderstandings between the parties in relation to its performance be referred to the engineer in charge of the work is valid and binding.

THIS is a proceeding to enforce a claim against the State, for the sum of $150,133.54.

Claimant alleges that this sum is due for work done by him in the performance of a contract with the State Highway Commission, an agency of the State.

Complaint was filed in the office of the Clerk of this Court, setting forth the nature and ground of the claim. After answer was filed to this complaint by the Attorney-General for the State, claimant, by leave of Court, filed his reply. By this proceeding, instituted pursuant to the provisions of C. S., 1410, claimant invokes the jurisdiction of the Supreme Court, conferred by section 9, Article IV of the Constitution of North Carolina, with respect to his claim.

The proceeding has been heard and considered upon the pleadings. It appearing to the Court therefrom, after argument by counsel, that claimant is not entitled to a decision of this Court, recommending that the General Assembly provide for the payment of the claim, by appropriation or otherwise, for the reasons set out in the opinion below, the proceeding is dismissed.

Ruark & Fletcher for claimant.

Attorney-General Brummitt and Assistant Attorney-General Ross for the State.

CONNOR, J. This Court, under the name of "The Supreme Court of North Carolina," consisting of a Chief Justice and four Associate Justices, is established and provided for by the Constitution of the State; it owes its existence to the Constitution alone, and is in nowise dependent upon statute, for either its existence or its jurisdiction. Const. of N. C., Art. IV. In *S. v. Smith,* 65 N. C., 369, *Pearson, C. J.,* speaking of this Court, as well as of the Court for the Trial of Impeachments, the Superior Courts, and the courts of the justices of the peace, says:

"These judicial tribunals are established by the Constitution; owe their existence to that instrument alone, and are in nowise dependent upon an act of the General Assembly."

This was not true of the Supreme Court of North Carolina prior to 1868; provision was made, for the first time in the history of the State, in the Constitution adopted in 1868, for the establishment of the Supreme Court. Prior to that date this Court was a mere statutory

Court, dependent both for its existence and its jurisdiction upon an act of the General Assembly. The General Assembly had the power to prescribe not only its jurisdiction, but also the rules of practice and procedure, in accordance with which its statutory jurisdiction should be exercised. See chapter 33, Revised Code of 1854.

Our jurisdiction, now conferred by the Constitution of the State, is both appellate and original. By section 8 of Article IV, the Court has jurisdiction "to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference." By section 9 it has original jurisdiction "to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action." In addition to this appellate and original jurisdiction, the Court also has, by virtue of the amendment to the Constitution of 1868, adopted in 1875, the same jurisdiction over "issues of fact" and "questions of fact," as that exercised by it prior to the adoption of the Constitution of 1868. This jurisdiction with respect to "issues" or "questions of fact" is exercised only in actions which are equitable in their nature, and in which relief is sought upon equitable principles. The Court also has the power, by virtue of the Constitution, to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. The jurisdiction of the Supreme Court is limited as well as conferred by the Constitution of the State. The Court exercises its jurisdiction by virtue of constitutional and not statutory provisions.

In re Applicants for License, 143 N. C., 1, *Hoke, J.,* says: "In performing the duty of examining applicants (for license as attorneys and counsellors at law) and issuing license, we are not acting as a Supreme Court; certainly not in the exercise of our constitutional powers. We are simply discharging a duty imposed upon us by the Legislature, which we would, no doubt, have the right to decline. We have heretofore done this work in obedience to this reasonable requirement on the part of the Legislature; partly following a custom which has been sanctioned by time and approved by trial; partly from our desire at all times to do what we can to uphold the traditions and promote the interests of the profession to which we belong."

It has been held by this Court that the General Assembly may, by statute, impose duties upon the Chief Justice and the Associate Justices of the Supreme Court, and upon the judges of the Superior Court, with respect to the supervision of elections; it was said that the effect of the statute was to make each Judge a Special Court, under section 2 of Article IV, with jurisdiction conferred by virtue of section 12 of said article. *McDonald v. Morrow,* 119 N. C., 666, *Harkins v. Cathey,* 119

N. C., 650. In each of these cases *Avery, J.,* dissented, filing an opinion stating the grounds of his dissent.

With respect to the power of the General Assembly to deprive the judicial department of the State government of powers or jurisdiction conferred by the Constitution, or to regulate the methods of procedure in the courts of the State, which owe their existence to the Constitution, it is provided in section 12 of Article IV thereof as follows:

"The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

This section is included in the Constitution in recognition of the "great, general, and essential principle of liberty and free government" declared in section 8 of Article I of the Constitution in these words: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."

By virtue of the foregoing principle, and because of the limitation upon the powers of the General Assembly contained in section 12 of Article IV, with respect to the Supreme Court, it has been held that the General Assembly is without power to enact rules of practice and procedure for the Supreme Court; its power in that respect is restricted to the enactment of such rules for the courts inferior to the Supreme Court. Rules of practice and procedure for the Supreme Court can be prescribed solely by the Court itself. In *Lee v. Baird,* 146 N. C., 361, it is said: "As the Constitution, Art. I, sec. 8, provides that 'the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other,' the General Assembly can enact no rules of practice and procedure for this Court, which are prescribed solely by our rules of Court. The practice and procedure in the courts below the Supreme Court are prescribed by the Legislature, as authorized by the Constitution, Art. IV, sec. 12, except that as to such lower courts when the Legislature fails to provide the practice and procedure in any particular, the Court can do so." C. S., 1421.

It is well settled that the General Assembly is without power to prescribe or to regulate the rules of practice or procedure in the Supreme Court, in accordance with which it shall exercise its appellate jurisdiction. The Court prescribes its own rules; these cannot be modified or regulated by statute. The same principle is applicable to the rules of practice and procedure in accordance with which the Court shall exercise its original jurisdiction with respect to claims against the State.

The original jurisdiction of the Supreme Court, invoked by the claimant in this proceeding, is derived from the same source as its appellate jurisdiction—the Constitution of 1868. Prior to said Constitution no jurisdiction with respect to claims against the State had been conferred upon or exercised by the Supreme Court. The provision for this jurisdiction appears first in the "Plan for Organization of the Judicial Department," reported to the Convention of 1868, by the committee on that subject. See Convention Journal 1868, p. 260. It appears as section 11 of said plan, and was adopted by the Convention on Friday, 28 February, 1868. It is now section 9 of Article IV. It is of interest to note that the Hon. William B. Rodman, a member of the Convention from Beaufort County, and afterwards an Associate Justice of this Court, was chairman of the committee which reported the Plan of Organization for the Judicial Department to the Convention. Judge Rodman was a member of this Court when the first cases, involving its jurisdiction with respect to claims against the State were considered and decided. He participated in such consideration and assented to the decisions made therein.

This Court has held in all the proceedings instituted since the adoption of the Constitution of 1868, in which the original jurisdiction with respect to claims against the State has been invoked, that such jurisdiction extended only to the decision of issues of law involved in such claims. It has declined to consider or to determine issues of fact, or to make decisions upon claims which involved only such issues. In *Bledsoe v. State,* 64 N. C., 392, decided at January Term, 1870, *Reade, J.,* writing for the Court, says:

"We are of the opinion that it was not contemplated that when a claim is presented against the State, there shall be a 'trial' of the facts in detail, but only that we should decide such questions of law as may seem to be involved, together with our own impression of the facts generally, so as to make our decision of the law intelligible. Especially must this be so, unless there shall be some legislation to enable us to find the facts in detail; for we have no jury, and if we had, it would be inconvenient and expensive to bring witnesses from all parts of the State; and depositions are always unsatisfactory. Probably, the provision in the Constitution was induced by the consideration that many claims would be presented, growing out of the events of the late war, and it was desired that they should have the consideration of the Court in aid of legislative action."

In *Miller v. State,* 134 N. C., 270, it appeared that the claim upon which the proceeding was instituted in this Court involved no issue of law, but only an issue of fact. In the opinion stating the grounds upon which the proceeding was dismissed, it is said: "We do not feel called upon, therefore, to make any recommendation to the General Assembly in the premises. If we should do so, the members of that body would have the right to feel justly offended that we should seek to point out their duty to them in a matter where there was no law question involved."

In *Dredging Co. v. State,* 191 N. C., 243, we declined to make a decision upon the claim which was the basis of that proceeding, upon its appearing that said claim involved no issue of law. The proceeding was dismissed, after a review of the opinions filed for the Court in similar proceedings, all of which are to the effect that this Court will make no decision upon a claim involving only an issue of fact.

While the original jurisdiction of this Court, with respect to claims against the State, is confined to the consideration of claims which involve issues or questions of law, and does not extend to the consideration of claims involving issues or questions of fact only, it is sometimes necessary, or at least helpful, in order that the Court's decision upon an issue or question of law may be intelligible, that facts in controversy shall be first found or determined. In such cases the Court will adopt and follow such rules of practice and procedure as it shall deem best in each case. It cannot be controlled with respect to such rules by statute. Therefore, notwithstanding the provisions of C. S., 1410, the Court is not required to transfer every proceeding to enforce a claim against the State, to the Superior Court in order that issues of fact, joined on the pleadings, shall be tried by a jury. This procedure will not be followed where the only issue between the claimant and the State, as appears by the pleadings, is one of fact.

The statute, C. S., 1410, was first enacted by the General Assembly in 1868. It appears in the Code of Civil Procedure, as section 416, and was in effect at the date of the decision in *Bledsoe v. State, supra.* The statute is as follows:

"Procedure to enforce claims against the State. Any person having any claim against the State may file his complaint in the office of the Clerk of the Supreme Court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the Governor, and therein request him to appear on behalf of the State, and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the Court. In case of an appearance for the State by the Governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the Court shall direct. If an issue of fact shall be joined on the pleadings, the Court shall transfer it to the Superior Court or some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had, shall certify to the Supreme Court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the Supreme Court. If the State shall not appear in the action by any authorized officer, the Court may make up issues and send them for trial as aforesaid. The Supreme Court shall in all cases report the facts found, and their recommendation thereon, with the reasons therefor, to the General Assembly at its next term."

Insofar as this statute provides for and prescribes the procedure by which a claimant may invoke the original jurisdiction of this Court, conferred by the Constitution, with respect to his claim against the State, it is valid, and enforceable in all respects; when, however, a proceeding has been duly instituted and filed in this Court, in accordance with the provisions of the statute, the procedure by which the Court will thereafter exercise its power to hear and decide upon the claim is or question of law. When it appears that there is no issue or question of law is presented which can be intelligently decided, without determining facts in issue, the Court will proceed to hear and decide such issue or question of law. When it appears that there is not issue or question of law involved no decision will be made and the proceeding will be dismissed. When, however, in order to decide an issue or question of law involved, the Court deems it best to have issues of fact first determined, the Court may or may not follow the provisions of the statute with respect to a trial by jury of such issues. The statute is at most, in this respect, directory. It cannot be controlling. In view of the decisions of this Court, with respect to procedure, the purpose of the General Assembly was manifestly to provide for trial by jury, only when the Court should deem such trial helpful. Neither the answers of the jury to the issues of fact, nor the decision of the court upon the issues of law, would be binding on the General Assembly.

The claim upon which this proceeding was instituted arises out of a contract between the claimant and the State Highway Commission. The latter is an agency of the State, which is the real party to the contract, and therefore not subject to an action on the contract. *Carpenter v. R. R.,* 184 N. C., 400. Claimant contends that certain work done by him, in the performance of the contract, constitutes a "drainage ditch," within the meaning of the contract, and that under its terms he is entitled to payment for said work at one dollar per cubic yard for dirt and material excavated by him in doing said work. It is admitted that in doing this work, claimant excavated 150,133.54 cubic yards of dirt and material. The State, through its agency, the State Highway

Commission, contends that the work done by claimant constitutes a "borrow pit," and that under the contract claimant was entitled to only forty cents per cubic yard on account of the excavation. It is admitted that claimant has been paid by the Highway Commission the amount due at the rate of forty cents. The only issue involved in the controversy is whether the work done by claimant for which he has filed his claim constitutes a "drainage ditch" or a "borrow pit." This is, we think, clearly an issue of fact, which this Court will not undertake to determine. There is no issue or question of law involved in the claim, the decision of which would be affected by a finding of the fact involved in the issue. We therefore decline to make any decision relative to the claim for transmission to the General Assembly.

It may be noted that the contract includes a provision to the effect that all disputes and misunderstandings between the parties thereto, relative to the construction and meaning of its provisions, and also relative to the performance by either of the parties thereto of said contract, shall be referred to the engineer in charge of the work, and that his decision with respect to such disputes and misunderstandings shall be final. The controversy between the claimant and the State Highway Commission has been decided against the contention of the claimant by the engineer in charge. His decision, by the express terms of the contract, is final. See *Chemical Co. v. O'Brien,* 173 N. C., 618.

For the reasons stated in this opinion, the proceeding is

Dismissed.

ALLETHAIRE L. ROTAN ET AL. v. THE STATE OF NORTH CAROLINA.

(Filed 7 March, 1928.)

1. **Courts—Federal Courts—Jurisdiction of Inheritance Tax Levied by State.**

The decision of the Supreme Court of the United States holding an inheritance tax invalid controls that of the State court upon the question when the tax is an inheritance or transfer tax upon shares of stock of a deceased nonresident testator held in a foreign corporation doing business in this State, and having transfer books here, when the shares and the devisees are beyond the jurisdiction of our courts.

2. **Courts — Supreme Court — Original Jurisdiction — When May Be Invoked—Inheritance Taxes.**

When the nonresident executors of a testator have failed to proceed in the Superior Court, C. S., 7979, to recover an amount they have paid as an inheritance tax to the State of North Carolina, under the provisions of C. S., 7776, the method by which the Legislature has authorized the State to be sued is exclusive, and the recommendatory original jurisdiction given by the Constitution, Art. IV, sec. 9, to the Supreme Court may not be invoked. C. S., 1410.

3. **State—Claim Against the State—State Must Consent to Action.**

Subject to rare exceptions, the State alone has the authority, through its Legislature, to authorize a suit against it, or to allow a claim and provide the method for its payment.

4. **State—Claims Against the State—Nature in General.**

An action to recover moneys paid to the State as an inheritance tax on the order of the State Tax Commission, a political agency of the State, is a suit against the State.

THIS is a proceeding to enforce a claim against the State of North Carolina for the sum of $17,909.62, with interest thereon from 2 December, 1920. The original jurisdiction of this Court, conferred by section 9 of Article IV of the Constitution of North Carolina, is invoked with respect to said claim.

Claimants filed their complaint in the office of the Clerk of this Court on 10 April, 1927. An answer to said complaint was filed thereafter by the Attorney-General on behalf of the State. The proceeding has been heard and considered by this Court upon the pleadings.

The nature and grounds of the claim for the enforcement of which the proceeding has been instituted in this Court, are set out in the complaint, as required by statute, C. S., 1410. All the material facts upon which the claim is founded are admitted in the answer. No issue of fact is raised by the pleadings.

Claimants have begun this proceeding and prosecute the same in this Court as executors of George W. Elkins, deceased. Their testator, at the date of his death, to wit, 23 October, 1919, was a resident and citizen of the State of Pennsylvania. At no time during his life had he been a resident or citizen of the State of North Carolina, or domiciled therein. He owned, at the date of his death, certificates of stock in, and securities issued by, the R. J. Reynolds Tobacco Company, a corporation created by, and existing under the laws of the State of New Jersey, but doing business in the State of North Carolina. No part of his estate, real or personal, was situate in the State of North Carolina. By his last will and testament, which was duly probated in the State of Pennsylvania, in accordance with the laws of said State, the said George W. Elkins bequeathed the certificates of stock in and securities issued by the R. J. Reynolds Tobacco Company to legatees named therein. None of these legatees are residents of or domiciled in the State of North Carolina. The certificates of stock and securities bequeathed in his last will and testament were held by the said George W. Elkins, at the time of his death, in safety deposit boxes of banks and trust companies situate in the State of Pennsylvania.

After the death of George W. Elkins, and after claimants herein had qualified as executors of his last will and testament, as required by the laws of the State of Pennsylvania, the State Tax Commission of North Carolina notified the R. J. Reynolds Tobacco Company, at its office in the city of Winston-Salem, N. C., that the State of North Carolina demanded the payment of an inheritance tax upon the stock and securities of said company bequeathed by the said George W. Elkins in his last will and testament, before said stock and securities were transferred on the books of said company, or before any dividends on said stock or interest on said securities were paid to the executors or to any one claiming under them. The said Tax Commission further demanded of the said executors that they furnish to the said Commission information required for the assessment of said inheritance or transfer tax. Pursuant to said demand, the said executors, protesting that the estate of their testator was not liable to the State of North Carolina for said tax, upon forms prescribed by said Tax Commission, furnished the information required. The said Tax Commission thereafter assessed the amount of said tax as claimed by it, at $17,909.62, and demanded the payment of said sum by said executors.

On 30 November, 1920, the executors of George W. Elkins, through their attorney, sent to the State Tax Commission of North Carolina, by mail, their check in payment of said tax. This check was received on 2 December, 1920, and a receipt acknowledging payment of the tax was thereafter duly forwarded to the executors. No protest in writing was made by said executors at the time said tax was paid, nor was any demand made by them for the return of said sum, prior to the commencement of this proceeding in 1927.

Accompanying said check was a letter addressed to the State Tax Commission, signed by the attorney for the said executors, in words as follows:

"*In re* Estate of George W. Elkins. I beg to acknowledge receipt of your statement of 23d inst., showing tax to be due to the State of North Carolina in the sum of $17,909.62.

"I herewith enclose the check of the executors to the order of the Commission for the amount of the taxes stated, and I will be obliged if you will forward to me consents for the transfer of all the North Carolina assets as noted in the return at your earliest convenience."

Claimants herein, as executors of George W. Elkins, in their complaint filed in this proceeding, allege that the State of North Carolina was without power to demand and collect any part of said tax from the estate of George W. Elkins on the stock and securities held by said estate in the R. J. Reynolds Tobacco Company, and that the assessment and collection of said tax was wrongful and illegal, for that the statute of the State of North Carolina, under which the said assessment and collection were made, was invalid. Claimants further allege that the collection of said tax was a taking of the property of said estate by the State of North Carolina without due process of law.

The State, by its demurrer *ore tenus* to the complaint, contends that this Court has no jurisdiction of this proceeding, under section 9, Article IV of the Constitution of the State, for that an action to recover the amount paid by claimants as a tax, upon the ground that said tax was wrongfully and illegally assessed and collected, was within the exclusive jurisdiction of the Superior Court, by virtue of the statute providing for such action against the State or its officer for the recovery of a sum illegally collected as a tax; the consent of the State to be sued in the action having been expressly given by statute.

Upon consideration of the demurrer *ore tenus* upon this ground, the Court was of opinion that it should be sustained for the reasons set out in the opinion below. The proceeding is therefore dismissed.

Manning & Manning for claimants.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

CONNOR, J. The sum paid by claimants as executors of George W. Elkins, deceased, and received by the State of North Carolina, as admitted in the pleadings herein, was assessed and collected by the State Tax Commission as an inheritance tax or transfer tax due by said executors to the State of North Carolina, by virtue of the provisions of C. S., 7776. This sum was paid and collected on 2 December, 1920. In *Trust Co. v. Doughton,* 187 N. C., 263, decided at Spring Term, 1924, this Court held that said statute was valid, and that by virtue of its provisions the tax collected from the plaintiff in that case, as executor, was a lawful tax, and that plaintiff, suing to recover the same in the Superior Court upon the allegation to the contrary, as authorized by statute, could not recover. The question presented for decision, as stated in the opinion of this Court, was, whether the Legislature of this State can impose an inheritance or a transfer tax upon the right of nonresident legatees or distributees to take by will, or to receive under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in the R. J. Reynolds Tobacco Company, and can require the payment of such tax as a condition precedent to the right to have said stock transferred on the books of the corporation. This question was answered in the affirmative, and in accordance with said decision the judgment of the Superior Court was affirmed. The judgment of this Court, however, was reversed, on a writ of error, by the Supreme Court of the United States. *Trust Co. v. Doughton,* 270 U. S., 69, 70 L. Ed., 475. It was there held that the statute under which the tax was assessed and collected was invalid, upon the principle that the subject to be taxed must be within the jurisdiction of the State, assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Claimant's contention made in this proceeding that the tax assessed and collected from them as executors of George W. Elkins, by the State of North Carolina was unlawful, for that it was not authorized by a valid statute, must be sustained. It must be held, now, since the decision of the Supreme Court of the United States, in *Trust Co. v. Doughton,* that the State Tax Commission was without authority to demand of claimants herein payment of the sum of $17,909.62, on 2 December, 1920, as an inheritance or transfer tax.

Claimants, however, had the right, conferred by statute, in accordance with its provisions, to bring an action in the Superior Court of this State to recover the sum paid pursuant to the demand of the State Tax Commission. Upon facts identical with the facts of this case, plaintiff in *Trust Co. v. Doughton, supra,* brought an action in the Superior Court, as authorized by statute, and recovered judgment therein against the State. Claimants failed to bring such action, and now that they have lost the right to maintain the action, they invoke the original jurisdiction of this Court with respect to their claim. They pray that this Court adjudge that they have a legal claim against the State for the sum of $17,909.62, with interest from 2 December, 1920; they pray that this Court recommend to the General Assembly of North Carolina that provision be made for the settlement of their claim.

Original jurisdiction is conferred upon this Court with respect to claims against the State, by the Constitution. It is expressly provided therein, however, that its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon. This Court renders no judgment in a proceeding in which this jurisdiction is invoked, nor has it power to enforce its decision made in such proceeding by process in the nature of execution. It decides only whether but for the exemption of the State from suit or action, by reason of its sovereignty, the claim would be valid and enforceable, in law, against the State; its decision, if favorable to the contentions of claimant, is transmitted to the General Assembly for its action upon the recommendation of the Court. The General Assembly alone has the power to determine that a claim against the State shall be paid or settled, and to provide by appropriation or otherwise for the payment or settlement of the claim. Every person who enters into a contract with the State, or who has any transaction with the State, or with any of its agencies, does so with knowledge that he has no right of action against the State to enforce such contract or to recover of the State by reason of such transaction. With respect to claims against the State, which may be presented to this Court, by proper proceedings, for its decision thereon, the State has not waived its exemption by reason of its sovereignty, from suit or action in any of the courts of the State. It is well settled that a State cannot be sued in its own courts, or in any other courts, unless it has expressly consented to such suit or action, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on that Court by the Constitution of the United States. 25 R. C. L., 412. Nor can a commission or board, created by statute, as an agency of the State, be sued. *Dredging Co. v. The State,* 191 N. C., 243; *Carpenter v. R. R.,* 184 N. C., 400. It is manifestly in recognition of this principle that original jurisdiction is conferred upon the Supreme Court of this State, with respect to claims against the State; the jurisdiction, however, is clearly defined and carefully limited by the provisions of the Constitution. Neither the State nor the General Assembly is bound by any decision made by this Court, with respect to a claim against the State, whether such decision be favorable or unfavorable to the claimant. Our decisions are merely recommendatory. They may be accepted or rejected by the General Assembly, which alone has the power to determine whether or not the claim is just, or whether or not a sound public policy requires that it shall be paid or settled.

At the time claimants herein, as executors of George W. Elkins, deceased, paid to the State Tax Commission the sum of money which they now insist the State should repay to them, for the reason that they were not liable for the tax assessed and collected by the State Tax Commission the State had expressly consented that an action might be brought and maintained in its courts for the recovery of the same, upon the allegation that the State was without power to require the payment of said sum as a tax; with respect to such action, the State had waived its exemption from suit or action by reason of its sovereignty. Statutes to that effect were then and have at all times since been in full force and effect. Actions have been repeatedly brought against the State or its agencies, by virtue of these statutes, and judgments have been rendered in such actions against the State. The Superior Courts of the State had ample jurisdiction with respect to an action by claimants herein to recover of the State or its agency, the Tax Commission, the money paid by them on 2 December, 1920. Claimants did not avail themselves of the right, conferred by statute, to bring such action. The fact that they have lost their right to recover said sum in an action against the State, prosecuted in the Superior Court, furnishes no ground upon which they are entitled to invoke the original jurisdiction of this Court, with respect to their claim. This Court, in the exercise of its original jurisdiction, conferred by the Constitution, will hear and consider a claim against the State only where the claimant has, or has had, no right of action against the State to recover upon his claim in a court of competent jurisdiction, by the consent of the State, expressly conferred by statute, to render final judgment against the State upon such claim and to enforce such judgment by process in the nature of execution. The jurisdiction of this Court, by virtue of which it may decide only issues of law involved in a claim against the State, its decisions then being only recommendatory, cannot be invoked by a claimant who has failed or neglected to pursue a remedy authorized by statute, which would have afforded him complete relief. Such remedy is exclusive.

For the reasons stated in this opinion the proceeding is
Dismissed.

TOWN OF AYDEN v. E. A. LANCASTER AND WIFE.

(Filed 14 March, 1928.)

1. **Eminent Domain—Proceedings to Take Property and Assess Compensation—Right to Trial by Jury.**

   In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by jury in the Superior Court to determine his damages when he has duly preserved it by his exceptions and proper procedure, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. C. S., 1724.

CIVIL ACTION, before *Harris, J.*, at September Term, 1927, of PITT.

The town of Ayden, a municipal corporation, filed a petition in 1923 for the condemnation of certain land owned by the defendants. Commissioners were duly appointed, and in accordance with the law said commissioners went upon the premises and thereafter on 3 September, 1923, filed a report, assessing damages in favor of the defendants in the sum of $900. Thereupon the defendants filed exceptions to the report of the commissioners. The basis of the exceptions so filed was that the value of the land taken was much more than $900. The clerk overruled the exceptions of the defendants and approved and confirmed the report of the commissioners. Whereupon the defendants excepted in writing to the order of the clerk and appealed to the Superior Court in term and demanded a jury trial on the issues raised by their exception to the report of the commissioners. Thereupon the clerk docketed the cause on the civil issue docket, to be tried by the court and a jury as provided by law.

Thereafter the cause came on to be tried in the Superior Court. At the conclusion of all the testimony the trial judge made the following order: "It is therefore ordered and decreed that a juror be withdrawn and that a mistrial is made, and the report of the commissioners appraising the damage sustained by the defendants in this cause be and the same is hereby in the discretion of the court set aside, and it is further ordered that a new appraisement of said damage in this cause be made, and to this end the clerk of the Superior Court of Pitt County is hereby directed to appoint three competent and disinterested freeholders of the county of Pitt, not residing in the town of Ayden, who shall go upon the premises set out and referred to in the petition filed in this cause, and after viewing the same shall assess the damages sustained by the defendant by reason of the taking of the land by the town of Ayden in this cause for street and cemetery purposes, and shall make their report of the same in writing in this cause within thirty days from the date hereof."

From the foregoing judgment the defendants appealed, assigning error.

Pittman & Eure and F. C. Harding for plaintiff.
Julius Brown for defendants.

BROGDEN, J. Consolidated Statutes, 1724, guarantees to a landowner the right of trial by jury in determining the amount of damages suffered by reason of the taking of property under the power of eminent domain. The only limitation imposed by law upon the right to such trial by jury is: "If upon the hearing of such appeal a trial by jury be demanded." The defendants demanded this right. *R. R. v. Newton,* 133 N. C., 132; *Durham v. Riggsbee,* 141 N. C., 128; *R. R. v. R. R.,* 148 N. C., 59; *Long v. Rockingham,* 187 N. C., 199.

The trial judge had full authority in his discretion to order a mistrial, but he was without authority, under the circumstances disclosed in this record, to remand the cause to the clerk of the Superior Court of Pitt County with direction "to appoint three competent and disinterested freeholders . . . who should go upon the premises . . . and, after viewing the same, shall assess the damages sustained by the defendant," etc. There was no irregularity in the proceeding, but upon the other hand the cause stood regularly upon the civil issue docket for trial upon exceptions duly filed upon the question of damage, and the defendants were entitled to have the issue of damage determined by a jury.

The appeal of defendants from the order of the clerk confirming the report of the commissioners brought into the Superior Court the entire case, where the trial must be had *de novo* so far as the question of damage is concerned. *Durham v. Riggsbee,* 141 N. C., 128; *S. v. Jones,* 139 N. C., 613; *R. R. v. R. R.,* 148 N. C., 59.

In *S. v. Jones, supra,* the Court said: "As he has taken an appeal, his damages will be assessed *de novo* by a tribunal whose jurisdiction is undoubted."

We hold, therefore, that the defendants are entitled to have the issue of damages determined by a jury, and the judgment ordering a new appraisal is

Reversed.

DOCK BAKER v. A. B. COREY, EXECUTOR OF FLORENCE BAKER, DECEASED.

(Filed 14 March, 1928.)

1. **Courts—Clerk of Court—Jurisdiction—Judgments by Default Final and Default and Inquiry.**

   The clerk of the Superior Court has jurisdiction to enter such judgments by default final and by default and inquiry as are authorized by statute. C. S., 595, 596, 597; 3 C. S., 593.

2. **Same.**

   A judgment by default final may be rendered by the clerk on failure of the defendant to answer where the complaint sets forth one or more causes of action, each consisting of a breach of an express or implied contract to pay a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation.

3. **Same—For Services Rendered.**

   In order for the plaintiff to be entitled to a judgment by default final upon the complaint for the want of an answer in his action to recover from the estate of the deceased for services rendered before her death, in taking care of and providing a support for her, at her request and promise to pay for them, there must have been a definite price fixed upon and understood and agreed to by both of the parties; and where the complaint alleges merely an estimate by the parties of a reasonable price to be paid for such services it supports a judgment by default and inquiry only.

4. **Judgments — Setting Aside for Irregularity — Grounds Therefor — Meritorious Defense.**

A judgment by default final entered upon the pleadings for the want of an answer, when it is made to appear on appeal that one by default and inquiry should have been entered, is an irregular judgment, but on defendant's motion to set it aside, he must show a meritorious defense.

5. **Appeal and Error—Remand for Correct Findings in Action to Set Aside Judgment for Irregularity.**

Where the clerk of the court has entered an irregular judgment of default final for the want of an answer to the complaint, and the trial judge has set it aside on that ground alone; and on appeal to the Supreme Court it does not appear that the question of a meritorious defense was considered or passed upon, and that the movant intended to allege one, the case will be remanded for the determination of this question as to whether the defendant has such meritorious defense as calls for the vacating of the judgment of the clerk of the court.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at October Term, 1927, of PITT. Remanded.

The plaintiff's suit to recover for services rendered in supporting and caring for the defendant's testatrix is based upon the following allegations:

"2. That on or about 1 January, 1919, Florence Baker, now deceased, came to the home of this plaintiff and stated to him that she was getting very old and feeble; that she had no home to go to and nowhere to live; that she did have some personal property in the way of money and notes, and that if the plaintiff would give her a home and take care of her in her old age and infirmity that she would pay him as she collected her money or that she would leave same when she died so that he could get whatever amount he was entitled to for taking care of her.

"3. That in consequence of the above statement this plaintiff told the said Florence Baker, now deceased, that she might make her home with him; that he would furnish her board, room and do all that he could to take care of her, and that he thought $75 a year would be sufficient to pay said bill, which she agreed to pay."

The plaintiff further alleged that the services continued through a period of five years and that he was entitled therefor to the sum of $525. No answer was filed, and the clerk gave judgment by default final. On appeal the trial judge held that the judgment should have been by default and inquiry, and that the judgment by default final was irregular. Upon this ground it was set aside, and the plaintiff excepted and appealed.

S. O. Worthington and Julius Brown for plaintiff.
F. C. Harding for defendant.

ADAMS, J. A clerk of the Superior Court has jurisdiction to enter such judgments by default final and by default and inquiry as are authorized by sections 595, 596, 597 of the Consolidated Statutes. Laws 1919, ch. 156; Ex. Sess., 1921, ch. 92, sec. 12; 3 C. S., 593. In section 595 it is provided that judgment by default final may be had on failure of the defendant to answer where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay a sum of money fixed by the terms of the contract or capable of being ascertained therefrom by computation. In an action based on contract the complaint must set forth not only the agreement of the parties, but the alleged breach, so that the court may determine whether the action as stated can be maintained. *Beard v. Sovereign Lodge,* 184 N. C., 154; *Thompson v. Dillingham,* 183 N. C., 566. Where in the absence of a written contract or evidence of indebtedness service is rendered at a fixed price and the price is known to the defendant at the time the service is performed, there is an implied promise to pay the ascertained price for which, upon proper allegations in a verified complaint and want of an answer, judgment by default final may be awarded. *Hyatt v. Clark,* 169 N. C., 178; *Bostwick v. R. R.,* 179 N. C., 485. But where the price is not ascertained and understood by the parties, and only the reasonable worth of the service is alleged, the plaintiff is entitled to nothing more than judgment by default and inquiry. *Witt v. Long,* 93 N. C., 389.

While the alleged contract is not clearly expressed, its most reasonable interpretation leads to the conclusion that the parties came to no definite agreement relative to the price at which the plaintiff's service was to be performed. The deceased agreed to pay him as she collected her money, or at her death to leave him money and notes out of which he could get "whatever amount he was entitled to for taking care of her." He "thought $75 a year would be sufficient to pay the bill"; but this allegation is a mere estimate resting in doubt. The testatrix contracted to pay his bill, or the reasonable worth of his services, but there was manifestly no "meeting of the minds" upon a definite price. The facts alleged are analogous to those in *Witt v. Long, supra.* There the plaintiffs alleged that they had sold and delivered goods to the defendants which were reasonably worth the price alleged, and that the defendants had agreed to pay for them. It was held that the allegation did not imply that the defendants had stipulated to pay the price charged for the goods, but that the goods were reasonably worth the stated price, and that the defendants by receiving them had by implication agreed to pay the sum demanded. We concur in his Honor's opinion that the judgment was irregular.

But irregularity alone is not sufficient. In *Duffer v. Brunson,* 188 N. C., 789, it is said: "It is essential for the moving party to show not only that he has acted with reasonable promptness, but that he has a meritorious defense against the judgment. As suggested in *Harris v. Bennett,* 160 N. C., 339, 347, 'Unless the Court can now see reasonably that defendants had a good defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?' *Hill v. Hotel Co., ante,* 586; *Gough v. Bell,* 180 N. C., 268; *Rawls v. Henries,* 172 N. C., 216; *Glisson v. Glisson,* 153 N. C., 185."

Neither in the judgment nor in the statement of the case on appeal is there any reference to the question of a meritorious defense; but defendant's amended motion may be construed as intended to allege a defense which, if true, would defeat or reduce the plaintiff's claim. The cause is therefore remanded for determination of the question whether the defendant has such a defense as calls for an order vacating the judgment and granting a trial upon the merits of the controversy.

Remanded.

SAMUEL H. NEWBERRY v. CLEVELAND L. WILLIS.

(Filed 14 March, 1928.)

1. **Libel and Slander—Qualified Privilege—Limitations Thereon.**
   Qualified privilege cannot successfully be pleaded as a bar to an action for slander when the fact is established that the defamatory words were untrue and maliciously spoken.
2. **Appeal and Error—Burden of Showing Error.**
   The burden is on the appellant to show error in the Supreme Court, and when none is made to appear the judgment rendered in the Superior Court in appellee's favor will be affirmed.

APPEAL by defendant from *Harris, J.,* at December Term, 1927, of CARTERET.

Civil action for slander, in that it is alleged the defendant falsely and maliciously charged the plaintiff with perjury while defending his administration as postmaster of Morehead City before the Carteret County Republican committee, assembled for the purpose of recommending an appointee for said post office.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint? Answer: Yes.

"2. If so, were they true? Answer: No.

"3. If so, were they privileged? Answer: No.

"4. What compensatory damage, if any, is the plaintiff entitled to recover from the defendant? Answer: Three hundred dollars.

"5. What punitive damage, if any, is plaintiff entitled to recover? Answer: Three hundred dollars."

Judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

D. L. Ward, J. F. Duncan, J. Frank Wooten and D. L. Ward, Jr., for plaintiff.

E. H. Gorham for defendant.

STACY, C. J. The defendant stressfully contends that, as a matter of law, the occasion in question was a qualifiedly privileged one and that it was error to submit the third issue to the jury. *Gattis v. Kilgo,* 128 N. C., 402, 38 S. E., 931, *S. c.,* 140 N. C., 106, 52 S. E., 249.

Non constat the words spoken were not true, and the jury has found, under the court's charge, that they were uttered maliciously. The third issue, therefore, may be disregarded without disturbing the judgment. *Ferrell v. Siegle, ante,* 102; *Elmore v. R. R.,* 189 N. C., 658, 127 S. E., 710.

Speaking to the question in *Byrd v. Hudson,* 113 N. C., 203, 18 S. E., 209, *Clark, J.,* delivering the opinion of the Court, said: "In *Ramsey v. Cheek,* 109 N. C., 270, the law of slander and libel is thus summarized: (1) When the words are actionable *per se,* unless the matter is privileged, the law presumes malice, and the burden is on the defendant to show that the charge is true. (2) If it is a case of absolute privilege, no action can be maintained, even though it could be shown that the charge was both false and malicious. (3) In a case of qualified privilege, the burden is on the plaintiff to prove both the falsity of the charge and that it was made with express malice. Or to put it more succinctly, if the words are actionable *per se* in 'unprivileged' slander and libel, falsity and malice are prima facie presumed. If 'absolutely privileged,' falsity and malice are irrebuttably negatived, and if it is a case of 'qualified privilege,' falsity and malice must be proven."

No reversible error having been made to appear on the record, the verdict and judgment will be upheld.

No error.

C. H. FIELDS v. PAGE TRUST COMPANY.

(Filed 14 March, 1928.)

Libel and Slander—Qualified Privilege—Banks.

A bank in good faith marking a check "signature forged," and refusing payment on this ground, acts within a qualified privilege, and is not liable in damages to the drawer thereof.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1927, of LEE.

Civil action for libel, in that it is alleged the defendant wrongfully returned a check negotiated by plaintiff with notation written thereon, "signature forged."

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the Page Trust Company cause the words "signature forged" to be endorsed on the check issued to plaintiff by M. D. Wicker, and thereafter returned the same to Wilkins-Ricks Company, as alleged in the complaint? Answer: Yes.

"2. Did the notation on said check and the return thereof to Wilkins-Ricks Company amount to a charge against the plaintiff that he had forged the same, or uttered the same, knowing it to be forged, as alleged in the complaint? Answer: Yes.

"3. If so, was said charge false? Answer: Yes.

"4. If so, did the Page Trust Company act in good faith in placing said notation on said check? Answer: Yes.

"5. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $150."

From a judgment for the defendant, *"non obstante veredicto,"* the plaintiff appeals, assigning errors.

Hoyle & Hoyle for plaintiff.
Williams & Williams for defendant.

STACY, C. J. Judgment was correctly entered for the defendant. The occasion being a qualifiedly privileged one, and the jury having found that the defendant acted in good faith, the answer to the fifth issue was properly disregarded. *Newberry v. Willis, ante,* 302.

No error.

NORFOLK SOUTHERN RAILROAD COMPANY v. RAPID TRANSIT COMPANY.

(Filed 14 March, 1928.)

Injunctions—Continuing to Hearing—Grounds—Trespass—Insolvency.

When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser.

Appeal by plaintiff from *Harris, J.*, at January Term, 1928, of Pitt.

Civil action to enjoin defendant from trespassing upon plaintiff's property, it being alleged that irreparable damage has been and will continue to be suffered from defendant's wrongful acts, which it threatens to continue *ad libitum* and has persistently repeated, notwithstanding notice and demand to desist.

The temporary restraining order entered in the cause was dissolved, from which plaintiff appeals, assigning error, because said order was not continued to the hearing.

F. G. James & Son for plaintiff.
J. Con Lanier for defendant.

Stacy, C. J. The facts are in dispute; they can be determined only by a jury. A continuous trespass may be enjoined, without an allegation of insolvency. C. S., 844; *Kinsland v. Kinsland,* 188 N. C., 810, 125 S. E., 625; *Cobb v. R. R.,* 172 N. C., 58, 89 S. E., 807. And where it can do no harm to grant the injunction, and a refusal is likely to subject one of the parties to further litigation, cost and trouble, the court will ordinarily interfere by orders until the facts can be found and the way made clearer. *McCorkle v. Brem,* 76 N. C., 407. See, also, *D. L. & W. R. R. Co. v. Morristown,* U. S., decided 20 February, 1928.

Error.

STANDARD OIL COMPANY v. W. C. MOORE et al.

(Filed 14 March, 1928.)

Trial—Motion to Nonsuit—Evidence Held Sufficient to Go to Jury.

It is error to grant a judgment as of nonsuit in plaintiff's action to recover for goods sold and delivered when there is evidence tending to show that a check marked paid, introduced in the trial, did not cover the transaction, though upon its face it purports to be "in full of all accounts to date." *Refining Corporation v. Sanders*, 190 N. C., 203, and other cases cited as controlling.

APPEAL by plaintiff from *Cranmer, J.*, at December Term, 1927, of LENOIR.

Civil action to recover $631.05, with interest, for goods sold by plaintiff and delivered to defendants on what is styled the "Columbia account."

The defendants offered in evidence a check for $3,681.98, made payable to the plaintiff, bearing notation: "Payment in full of all accounts to date," and contended that the account in suit was covered by said payment.

But there was evidence that this check was given to plaintiff's agent at Kinston and that it only covered accounts in his district, which did not include the Columbia account.

From a judgment of nonsuit entered at the close of all the evidence the plaintiff appeals.

Cowper, Whitaker & Allen for plaintiff.
F. E. Wallace and Shaw & Jones for defendants.

STACY, C. J. Reversed on authority of *Refining Corporation v. Sanders,* 190 N. C., 203, 129 S. E., 607, and *Bogert v. Mfg. Co.,* 172 N. C., 248, 90 S. E., 208.

Reversed.

STATE v. ROBERT HARRIS.

(Filed 14 March, 1928.)

Criminal Law—Variance Between Proof and Indictment—Dismissal and New Bill.

Where an indictment alleges the larceny of certain goods as the property of a certain person, proof that it was that of a different person is a fatal variance from the allegation of the indictment, and the action will be dismissed with leave of the solicitor to draw another bill.

APPEAL by defendant from *Harris, J.*, at December Term, 1927, of GREENE.

Criminal prosecution tried upon an indictment charging the defendant and another with larceny.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison for a term of not less than 18 months nor more than four years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. H. Taylor and George M. Lindsay for defendant.

STACY, C. J. The bill of indictment charges the defendant and another with the larceny of "700 pounds of leaf tobacco, of the value of over $20, of goods, chattels and moneys of one Berry Haywood, Lucinda Speight and Mrs. Minnie Herring." All the evidence adduced on the hearing tends to show that the tobacco, if stolen, was the property of Berry Speight. There is a fatal variance between the indictment and the proof; the charge relates to one offense, the proof to another. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Gibson,* 170 N. C., 697, 86 S. E., 774.

The verdict will be set aside, the action dismissed as to the appealing defendant, and the solicitor allowed to send another bill, if so advised.

Reversed.

DEWEY BROTHERS v. MARGOLIS & BROOKS.

(Filed 14 March, 1928.)

1. **Banks and Banking — Checks — Rights and Liabilities of Drawer, Drawee, and Banks in Course of Collection.**

When a collecting bank receives a check for collection payable at a bank in another town, there is no authority of agency conferred by the drawer of the check on it to receive in payment anything but money; and where the drawer of the check has money to meet the check on deposit in the drawee bank, on presentment in due course, and an intervening bank, in the course of collection, receives a check of the drawee bank in payment, which is not paid by reason of the drawee bank becoming insolvent before presentment of its check: *Held,* as a matter of law the drawer of the check is released from liability thereon. 3 C. S., 220(n), has no application to the facts in this case.

2. **Election of Remedies of Debtor Upon Unpaid Check.**

When a check on a bank by the drawer has not been paid upon presentment at the drawee bank in due course, by reason of insufficient funds, the payee may elect to bring action upon the unpaid check or upon the obligation for which the check was given.

3. Banks and Banking—Checks—Presumptions.

A check marked paid by the drawee bank in the hands of the drawer thereof is only prima facie evidence of payment, and may be rebutted by showing that payment had not in fact been made.

APPEAL by defendants from *Grady, J.*, at November Term, 1927, of WAYNE. New trial.

Action begun in the court of a justice of the peace of Wayne County to recover the sum of $190.39, with interest from 10 April, 1926, due by contract. Defendants relied upon their plea of payment. From judgment rendered in said court defendants appealed to the Superior Court of Wayne County.

The issue submitted to the jury at the trial in the Superior Court was answered as follows:

"In what amount, if any, are defendants indebted to plaintiffs: Answer: $190.39, with interest from 10 April, 1926." From judgment on the verdict defendants appealed to the Supreme Court.

Kenneth C. Royall and Jack Joyner for plaintiffs.
Joseph E. Johnson and Rivers D. Johnson for defendants.

CONNOR, J. Plaintiffs are engaged in business in the city of Goldsboro, Wayne County, North Carolina. Defendants are merchants, residing at Warsaw, in Duplin County, said State.

At the trial below plaintiffs alleged that on 10 April, 1926, defendants were indebted to them in the sum of $190.39 for merchandise. This allegation was admitted by defendants. Defendants, however, alleged that on or about said day they sent to plaintiffs by mail their check drawn on the Bank of Warsaw, payable to the order of plaintiffs for said sum, in payment of their said indebtedness. Plaintiffs admitted the receipt by them of said check on 15 April, 1926, but alleged that said check, although thereafter duly presented to the Bank of Warsaw for payment, was not paid by said bank. Defendants alleged that said check upon its presentment, as alleged by plaintiffs, was promptly paid by the Bank of Warsaw on 17 April, 1926.

The sole question, therefore, involved in the issue submitted to the jury was, whether defendants' check on the Bank of Warsaw, payable to the order of plaintiffs, was duly paid by the said Bank of Warsaw.

Defendants excepted to the refusal of the court to allow their motion for judgment as of nonsuit, at the close of the evidence, and also to the court's instruction to the jury, that if they believed the evidence they should answer the issue, "190.39, with interest from 10 April, 1926." The instruction was, in effect, that if the jury believed the evidence they should find that defendants' check was not paid by the Bank of Warsaw, and that defendants' plea of payment was not sustained. Defendants, upon their appeal to this Court assign the ruling of the court upon their motion for judgment as of nonsuit, and this instruction as error.

There was no error in the refusal of the court to allow the motion for judgment as of nonsuit. Defendants admitted the indebtedness; the burden was on them to establish the truth of their plea of payment. The issue was properly submitted to the jury upon all the evidence.

The facts shown by the evidence, and relied upon by each of the parties to the action as sustaining their respective contentions as to the determinative question involved in the issue, are as follows: Upon receipt of defendants' check, drawn on the Bank of Warsaw, and payable to their order on 15 April, 1926, plaintiffs endorsed and deposited the same to their credit with the Wayne National Bank of Goldsboro, N. C. The Wayne National Bank at once forwarded the check by mail to the Wachovia Bank and Trust Company at Winston-Salem, N. C., for collection and credit to its account. The Wachovia Bank and Trust Company promptly sent said check to the Bank of Warsaw for payment. The check was thus presented to the Bank of Warsaw for payment on 17 April, 1926. On said day defendants, drawers of the check, had on deposit with the Bank of Warsaw to their credit, and subject to their check, a sum in excess of the amount of the check, payable to the order of plaintiffs, and thus presented to said bank for payment. The Bank of Warsaw, upon its receipt of the check, through the mail, from Wachovia Bank and Trust Company, charged the amount thereof to the account of defendants and marked the check "Paid." It subsequently delivered the check thus marked "Paid," with other canceled checks to defendants, together with a statement of their account, showing that the amount of the check had been deducted from their total credits.

The Bank of Warsaw, on the same day that it charged the check to the account of defendants and marked it "Paid," to wit, 17 April, 1926, drew its check, payable to the order of Wachovia Bank and Trust Company, on the Murchison National Bank of Wilmington, N. C., for the amount of defendants' check and forwarded same by mail to Wachovia Bank and Trust Company, in remittance of the proceeds of defendants' check, received by it from said Wachovia Bank and Trust Company for collection. On 22 April, 1926, the Bank of Warsaw closed its doors and ceased to do business. It was insolvent on said day. Its check drawn on the Murchison National Bank, and payable to Wachovia Bank and Trust Company was not paid. On the day on which it was drawn by the Bank of Warsaw the said bank did not have sufficient funds to its credit with the Murchison National Bank for the payment of its said check. It did have sufficient money, however, on hand from the date on which defendants' check was drawn until the date on which it ceased to do business, to pay said check.

The Wachovia Bank and Trust Company has charged the account of Wayne National Bank with the amount of defendants' check, and the Wayne National Bank has charged the account of plaintiffs with said amount. Plaintiffs have not been paid the amount of defendants' check. The Wachovia Bank and Trust Company has filed a claim with the receiver of the Bank of Warsaw for the amount of the check drawn by said bank, and payable to its order, on the Murchison National Bank.

Defendants' assignment of error, based upon their exception to the instruction of the court to the jury, which was in effect that upon all the evidence, if they believed the same, they should find that defendants' check upon the Bank of Warsaw was not paid, upon its presentment to said bank, must be sustained.

Defendants' indebtedness to plaintiffs was not paid by the check which defendants sent by mail to plaintiffs, and which plaintiffs accepted and deposited in the Wayne National Bank to their credit, unless said check was upon its presentment paid by the Bank of Warsaw.

It is well settled as the law that, in the absence of an agreement to the contrary, the delivery of a check by a debtor to his creditor, and the acceptance of the check by the creditor, is not a payment of the indebtedness until the check has been paid by the drawee bank. The debtor is not discharged of liability for the debt unless his check is paid. The check is only a conditional payment. If it is not paid by the drawee bank, upon presentment, the creditor may recover upon the debt, or he may sue upon the check at his option. *Hayworth v. Ins. Co.,* 190 N. C., 757; *Graham v. Warehouse,* 189 N. C., 533; *Bank v. Barrow,* 189 N. C., 303. If, however, the check is paid by the drawee bank, the debt is paid, and the debtor is discharged of liability to the creditor on account thereof.

Upon the facts which all the evidence in the instant case established, if same was believed by the jury, as between the defendants, drawers of the check and the Bank of Warsaw, the drawee bank, the check was paid. The Bank of Warsaw was discharged of liability to defendants as depositors to the extent of the amount of the check. Defendants, as depositors, could not have recovered of the bank the amount of their check after the said check had been charged to their account, and the proceeds remitted to Wachovia Bank and Trust Company by check which was accepted by said Trust Company. With respect to said amount the Bank of Warsaw became the debtor of the Wachovia Bank and Trust Company. This debt was not paid because of the nonpayment of the check of the Bank of Warsaw by the Murchison National Bank. In recognition of the relation of creditor and debtor, with respect to the proceeds of defendants' check, between it and the Bank of Warsaw, the Wachovia Bank and Trust Company has filed its claim with the receiver of the Bank of Warsaw for the amount of this check.

The facts of this case are distinguishable from those in *Graham v. Warehouse,* 189 N. C., 533. In the first place, the question as to whether the check had been paid in the latter case was presented in an action between the depositor and the bank. In this case the question as to payment arises in an action between the drawer of the check and the payee. In the case of *Graham v. Warehouse, supra,* Lawson, the drawer of the check, paid the amount of the check to Weinstein, the payee, to whom it had been charged back by his bank. Upon the facts presented neither Weinstein nor the banks which had handled the check had any claim against the bank for the proceeds of Lawson's check. Lawson, by paying to Weinstein the amount of the check, sent by the drawee bank, in payment of his check to the collecting bank, was held to be subrogated to the rights of said collecting bank and of Weinstein. Lawson was therefore entitled to his counterclaim, either because his check had not been paid by the bank or because he was the owner by subrogation of the proceeds of his check if same had been paid. For that reason the decision in *Graham v. Warehouse* is not an authority for holding that upon the facts of the instant case defendants' check had not been paid by the Bank of Warsaw.

The fact that the Bank of Warsaw has not paid to the Wachovia Bank and Trust Company the proceeds of the defendants' check, because its check on Murchison National Bank was not paid, cannot be held, on the facts of this case, to affect the defendants. When defendants drew their check, payable to the order of plaintiffs, and sent same to the plaintiffs in payment of their indebtedness, they undertook that the check would be paid by the drawee bank, upon its due presentment, in money. When this check was presented to the drawee bank for payment, defendants had on deposit with said bank sufficient funds for the payment of the check, and the said bank had on hand a sufficient sum of money with which to honor the check. The acceptance by the Wachovia Bank and Trust Company of a check drawn by the Bank of Warsaw on the Murchison National Bank in payment of the proceeds of defendants' check, in the absence of evidence tending to show that defendants had authorized or consented to such acceptance, was at the risk of the Wachovia Bank and Trust Company. It had the right to demand that the check of defendants be paid in money. It waived this right at its own risk, and not at the risk of defendants.

There was no relation of principal and agent between defendants and the Wachovia Bank and Trust Company with respect to the presentment and collection of defendant's check. Neither the Wayne National Bank nor the Wachovia Bank and Trust Company received said check for deposit or collection on account of defendants. 3 C. S., 220(n), which is section 39 of chapter 4, Public Laws 1921, has no application to this case. It is applicable only when the liability of a bank which has received for collection or deposit a check drawn on a bank located in another city or town, to the holder or depositor of the check, is involved. The statute cannot be held to affect the right of the drawer of the check to have the payee or his agent for collection to demand money in payment of his check or to take the risk of accepting anything but money. The drawer of a check, who has delivered same to the payee, is without power to direct how or when, or by what agency, the payee or subsequent holder shall present the check for payment, or in what medium he shall demand payment to the drawee bank. He has undertaken only that if due presentment be made the check will be paid in money. He is discharged of liability as drawer, when the drawee bank, out of funds in its hands to his credit, pays the check with money or in any other medium accepted by the holder of the check.

The principle that "where a check, given by a debtor on a certain bank in payment of his debt, was by another bank acting as collector for the creditor and payee forwarded, for collection or payment, to the drawee bank, in which there was more than enough money on deposit to the credit of the drawer at the time the check arrived there to pay the same, whereupon the drawee bank drew its draft upon another bank for the amount of the check, and forwarded the same to the collecting bank, and charged, canceled and surrendered the check to the drawer, he was thereby discharged from liability on the debt," has been frequently approved and applied. This principle has been recently approved and applied by Supreme Court of the United States in *City of Douglass v. Fed. Res. Bank of Dallas,* 271 U. S., 489, 70 L. Ed., 1051. See, also, *Malloy v. Fed. Res. Bank of Richmond,* 281 Fed., 997, in which this principle as stated in *Milling Co. v. Bank,* 120 Tenn., 225, 111 S. W., 248, 18 L. R. A. (N. S.), 441, is quoted with approval.

There was error in the instruction of the court to the jury. The jury should have been instructed that if they believed the evidence, and found the facts to be as all the evidence tends to show, defendants' check on the Bank of Warsaw was paid, and that plaintiffs are not entitled to recover in this action. For the error in the instruction there must be a

New trial.

H. W. QUARLES v. O. B. TAYLOR & COMPANY AND THE FARMERS AND MERCHANTS BANK.

(Filed 14 March, 1928.)

For digest see *Dewey v. Margolis, ante,* 307.

APPEAL by defendants, O. B. Taylor & Company, from *Townsend, Special Judge,* at October Term, 1927, of HALIFAX. Reversed.

Action upon a check drawn by defendants, O. B. Taylor & Company, on the Bank of Whitakers, and endorsed by the payee therein to plaintiff. The check was thereafter deposited by plaintiff, the holder thereof, with defendant, Farmers and Merchants Bank. The said bank entered the amount of the said check as a credit upon plaintiff's account with it; subsequently, it charged plaintiff's account with the amount of the check, upon its contention that said check had not been paid by the Bank of Whitakers, upon its presentment for payment.

The controversy between the parties to this action arises upon their respective contentions (1) as to whether upon the facts agreed the said check was duly presented to and paid by the Bank of Whitakers, and (2) if said check was not so presented and paid, as to whether plaintiff used due diligence in presenting said check to the drawee bank. The court was of opinion that upon the facts agreed the said check was not paid by the Bank of Whitakers, upon its presentment. The issue submitted to the jury was answered as follows:

"Did the plaintiff use due diligence in presenting the check sued upon for collection? Answer: Yes."

From judgment that plaintiff recover of the defendants, O. B. Taylor & Company the amount of the check, with interest thereon from 21 December, 1925, said defendants appealed to the Supreme Court.

Joseph P. Pippin and Dunn & Johnson for plaintiff.
Cooley & Bone for defendants, O. B. Taylor & Company.

CONNOR, J. The parties to this action filed herein a statement of facts agreed upon by them. It was agreed that said statement should be read to the jury, at the trial of the action, and that the facts stated therein, as alleged in the pleadings, should be taken as true. It was further agreed that each party reserved the right to offer evidence at the trial to establish additional facts, in support of his contention, if he so desired. No evidence, however, was offered by either party. The respective contentions of both plaintiff and the defendants were submitted to the court and jury upon the statement of facts agreed. Defendants, O. B. Taylor & Company, moved that upon these facts the action be dismissed as upon nonsuit. The motion was denied. Defendants' first assignment of error, upon their appeal to this Court, is based upon the exception to the denial of their motion.

The facts set out in the agreed statement are substantially as follows: On 17 December, 1925, defendants, O. B. Taylor & Company, merchants engaged in business at Whitakers, N. C., drew their check on the Bank of Whitakers for the sum of $390.55, payable to Lewis Lynch or order; they delivered this check to the said Lynch for value. Thereafter the said Lewis Lynch, for value, endorsed and delivered the check to plaintiff, who is a resident of Halifax County, N. C.

On 21 December, 1925, plaintiff deposited said check, endorsed to him by the payee, with the defendant, Farmers and Merchants Bank, at Littleton, N. C. In making said deposit plaintiff used a deposit slip, on which are printed the following words: "All items are accepted at the depositor's risk until we have received final actual payment. We assume no liability beyond due diligence in forwarding items to any bank or collection agency."

On the date of said deposit the account of plaintiff with said Farmers and Merchants Bank was credited with the amount of said check. On the same day, to wit, 21 December, 1925, the Farmers and Merchants Bank forwarded said check to one of its correspondent banks for collection. The check was thereafter, to wit, on 24 December, 1925, forwarded by a bank which had received it, in due course, for collection, to the Bank of Whitakers. The Bank of Whitakers received the check, and on 29 December, 1925, charged same to the account of defendants, O. B. Taylor & Company, and marked the same "Paid." The said check, duly canceled, was returned by the Bank of Whitakers to said defendants, the drawers thereof, on or about 1 January, 1926. At all times, from 17 December, 1925, the date on which the check was drawn, until 29 December, 1925, the date on which it was charged to their account, defendants, O. B. Taylor & Company, had on deposit with the Bank of Whitakers an amount in excess of the amount of said check.

On the next day after the day on which the said check was charged to the account of defendants and marked "Paid," as aforesaid, to wit, on 30 December, 1925, the Bank of Whitakers remitted for the proceeds of said check to the bank from which it received said check by its draft on the National Bank of Commerce of Norfolk, Va. Prior to the presentation of said draft to the National Bank of Commerce, the Bank of Whitakers ceased to do business. It was closed by the Bank Examiner of the State of North Carolina on 4 January, 1926, because of its insolvency. Its assets are now in the hands of a receiver. The draft of the Bank of Whitakers on the National Bank of Commerce, by which the

Bank of Whitakers remitted for the proceeds of the checks drawn on said bank by defendants, O. B. Taylor & Company, was not paid upon presentment. On 8 January, 1926, the defendant, Farmers and Merchants Bank charged the amount of the check deposited with it by plaintiff to plaintiff's account, upon its contention that said check had not been paid by the Bank of Whitakers, upon its due presentment.

Upon the foregoing facts the court was of opinion that the check drawn by defendants, O. B. Taylor & Company, had not been paid by the Bank of Whitakers, and that said defendants, as drawers of the check were liable to plaintiff, if the plaintiff had used due diligence in presenting said check to the drawee bank for payment. In accordance with this opinion the court denied the motion that the action be dismissed as of nonsuit and submitted the issue set out in the record to the jury.

Defendants' assignment of error, based upon their exception to the refusal of the court to allow their motion that the action be dismissed, as upon nonsuit, upon the facts agreed, no evidence tending to show additional facts having been offered by either party at the trial must be sustained.

Upon the facts agreed, defendants' check on the Bank of Whitakers was paid. *Litchfield v. Reid, ante,* 161; *Dewey v. Margolis, ante,* 307. Defendants were thereby discharged of liability, as drawers of the check, to plaintiff, as holder thereof, by endorsement of the payee. The question as to due diligence on the part of plaintiff in presenting the check for payment does not arise upon the facts agreed, and is not determinative of the plaintiff's right to recover of defendants.

Defendants' motion should have been allowed and judgment entered dismissing the action.

Reversed.

I. M. BROWN, INDIVIDUALLY, AND AS EXECUTOR OF JOSIAH BROWN, v. MINNIE BRITTON BROWN, N. H. BROWN AND BRUCE BROWN.

(Filed 14 March, 1928.)

1. Wills—Rights and Liabilities of Devisees and Legatees—Advancements—Construction of Wills.

When a testator has died leaving an estate from which he specifically excludes two of his children as his heirs at law, stating that he had given each of them, as advancements, his portion of the inheritance, and that they were to receive nothing as such heirs: *Held,* a codicil to the will providing for the upkeep of a burial place on the "home place," and also providing that should there be a residue of his personal property it should be equally divided among his heirs at law, refers to such heirs that were not excluded by the express terms of the will. In this case each of the excluded heirs had executed a recorded writing to the effect that he had received his full share of the inheritance, as stated in the will.

2. Wills—Construction—General Rules.

Where the testator has added codicils to his will the will will be construed with the codicils so as to effectuate the intent of the testator, as expressed by the entire writing.

APPEAL by defendants, N. H. Brown and Bruce Brown, from *Nunn, J.*, at November Term, 1927, of BERTIE. Affirmed.

The following judgment was rendered by the court below: "This cause coming on to be heard at this term before his Honor, R. A. Nunn, judge, and the same being heard, and by consent of the parties the same being heard before judge upon all matters raised in said pleadings; and it further appearing to the court, and being admitted in court by both plaintiff and defendants, that only questions of law are involved, and that there are no issues of fact to be passed upon by a jury, and the court being requested to find the facts and state the conclusions of law arising thereon, the court finds the following facts, to wit:

1. That Josiah Brown died testate on 25 June, 1926, and his last will and testament and two codicils attached thereto as a part of the said will were duly admitted to probate and recorded in the office of the clerk of the Superior Court of Bertie County, which will and codicils the court finds to be the last will and testament of the said Josiah Brown, and the same are made a part of this judgment.

2. That I. M. Brown, the executor named therein, has duly qualified as executor of the said estate, and is now acting as such.

3. That only the right to certain personal property is in controversy in this action, and the same was brought for the purpose of construing the said will and codicils and determining the disposition of thirteen shares of bank stock and a note of six hundred dollars now in the hands of the executor and unadministered, also one $100 Liberty Bond, and $500 cash.

4. That Bruce Brown is the only heir at law of Tulie C. Brown, who was a son of Josiah Brown.

5. That Malinda Brown, wife of Josiah Brown, is dead, and that Minnie Britton Brown, N. H. Brown, Bruce Brown, and I. M. Brown, are the sole heirs at law and distributees of the said Josiah Brown under the law.

6. That Tulie C. Brown executed an agreement of record in Book 105, page 486, office of the register of deeds for Bertie County, releasing his interest in his father's estate, which agreement is referred to in Item 8 of the said will.

7. That N. H. Brown executed a similar agreement of record in Book 114, page 141, office of register of deeds for Bertie County, and which is referred to in Item 9 of the said will.

And upon such facts appearing to the court, the court being of the opinion that Bruce Brown and N. H. Brown take nothing by virtue of the said will, as appears from items 8 and 9 thereof, and other parts of said will, and the court being also of the opinion that under Item 7 of the said will the bank stock, Liberty Bond, $500 in money, and note of $600 were not intended by the said testator to pass absolutely under said item to Minnie Britton Brown, but that under the last clause of the second codicil, executed 24 February, 1923, the said Minnie Britton Brown and I. M. Brown share equally in said personal property:

It is therefore ordered, considered, adjudged and decreed that I. M. Brown, executor, distribute the said property equally to I. M. Brown and Minnie Britton Brown, after paying all debts and costs of administration.

It is further adjudged that I. M. Brown and Minnie Britton Brown are the owners of the said thirteen shares of bank stock, the said Liberty Bond, the note for $600 and the $500 cash, in equal proportions.

It is further adjudged that N. H. Brown and Bruce Brown own no right, title, interest or estate in and to the aforesaid property, and are not entitled to share in the said personal property, and that the plaintiff go hence without day as to all of their demands and recover his costs, the same to be taxed by the clerk of this court."

The other necessary facts will be set forth in the opinion. The only exception and assignment of error was to the judgment of the court below.

Craig & Pritchett for plaintiff.

Edgar T. Snipes and Winston, Matthews & Kenney for defendants.

CLARKSON, J. The court below by consent found the facts. Josiah Brown died 25 June, 1926, and left a will with two codicils. I. M. Brown, plaintiff, was left executor. There was no caveat to the will. His wife, Malinda Brown, died after the will was made and before the first codicil was made. He left four children: (1) Minnie Britton Brown, (2) N. H. Brown, (3) I. M. Brown, (4) Tulie C. Brown, who is dead and who left one heir at law, Bruce Brown, one of the defendants.

In the findings of facts we have: "That Tulie C. Brown executed an agreement of record in Book 105, page 486, office of the register of deeds for Bertie County, releasing his interest in his father's estate, which agreement is referred to in Item 8 of the said will; that N. H. Brown executed a similar agreement of record in Book 114, page 141, office of the register of deeds for Bertie County, and which is referred to in Item 9 of the said will."

Items 8 and 9 of the will are as follows:

"Item 8. My son, Tulie Chesson, has been amply provided for during my lifetime. I have given him the farm known as the Willis Barrett farm, besides repairing the dwelling-house on said farm and also giving him a horse and a year's provision, all of which farm and other provisions made for him I have made as an advancement, and what I have given him is all the share that I wish him to have in my estate, and he is not to share in my lands or other property which may belong to my estate at my death. My son Tulie and I fully understand each other, as is evidenced by a contract which we have heretofore made and executed between each other, which is of record in Book 105, page 486, register of deeds office for Bertie County, North Carolina, and said contract is referred to and made a part of this my last will and testament.

"Item 9. My beloved son, Newton Henry, is not to share in my estate at my death, neither real, personal or mixed, because he has been amply provided for during my lifetime, as evidenced by an instrument of writing of record in Book 114, page 141, register of deeds office for Bertie County, N. C., which record is referred to and made a part of my last will and testament. The advancement which I have made to my son Newton Henry consists of the home place on which he now lives, a horse and other personalty which is in full settlement with him of all right of claim in my estate."

It will be noted that as to Tulie C. Brown, the will distinctly says: *"What I have given him is all the share that I wish him to have in my estate, and he is not to share in my lands or other property which may belong to my estate at my death."* As to N. H. Brown, the will distinctly says: *"Is not to share in my estate at my death, neither real, personal or mixed, because he has been amply provided for during my lifetime."*

The contracts under seal between Josiah Brown and the two sons, Tulie C. Brown and N. H. Brown, were both recorded and recitals in each are as follows: *"Having received all of my share of property whereof I (would) be entitled to in my father's and mother's estate, . . . feeling satisfied that I have received my full share of property whereof I am heir and that I shall not be entitled to no (any) more property in my father's and mother's estate during their life, nor shall I be entitled to any more at their death."* The contract with Tulie C. Brown was dated 1 January, 1901, and N. H. Brown, 15 April, 1902.

The will of Josiah Brown was made 6 October, 1910, the first codicil 11 June, 1914, and the second 24 February, 1923.

The second codicil has reference with particularity to a trust fund of $500 to be used for the upkeep of the family burying ground. In the will he mentions that it is his will and desire that his body be buried in the graveyard on my "home place," and one-half acre to be reserved, "embracing the graveyard to be used as a burying ground for my descendants." The codicil says: "Wishing to preserve and keep sacred from the hands of vandalism the graveyard or cemetery where sleep my wife and children, and where I expect to make my last resting place, it is my will and desire that the said graveyard be kept and preserved with sacred care."

The last clause of this second codicil is where defendants claim their rights arise, which is as follows: *"If there should be any property remaining after the same has been divided according to my last will and testament and the two codicils, it is my will and desire that it be divided equally among my heirs at law under the canons of descent."*

But, on the other hand, plaintiffs claim the first part of the second codicil shows that defendants, N. H. Brown and Bruce Brown (only heir of Tulie C. Brown) can have no interest, as the second codicil says: *"I, Josiah Brown, of said county and State, make this second codicil to my last will and testament, and dated 6 October, 1910, which I ratify and confirm, as also the codicil dated 11 June, 1914."*

The court below in construing the will excluded N. H. Brown and Bruce Brown from any participation in certain of the personal property, and adjudged that Minnie Britton Brown, who does not appeal, and I. M. Brown, plaintiff, is entitled to the same. In this we think the court below correct.

From the contracts and will it clearly appears that the testator had fully provided for N. H. Brown and Tulie C. Brown, father of Bruce Brown. In fact, N. H. Brown and Tulie C. Brown, under their hands and seals signed a solemn agreement to that effect. This agreement was specifically referred to in the will and they in the will, by clear language, were excluded from any further share.

We do not think that the latter part of the second codicil gave them anything additional. The will and codicils are to be construed as a whole. The clear language of the contracts and will was to the effect that N. H. Brown and Tulie C. Brown, father of Bruce Brown, were to get nothing from the estate. The first part of the second codicil ratifies and confirms the will, which gives them nothing, and the latter part of the second codicil divides the remaining property "equally among my heirs at law," we think, namely: I. M. Brown and Minnie Britton Brown, the two children who had not been previously provided for and only provided for by the will. They were the heirs at law referred to. We think this construction is further borne out by the reason of the fact that in Item 12 of the will, before he appoints the executor, he gives certain life insurance "to my beloved daughter Minnie Britton (Brown) and Isaac McCony (Brown) *to share and share alike.*" Further in the contracts both N. H. Brown and Tulie C. Brown agree that they have received their full share of property "*whereof I am heir.*" We think they have no rights under the will. If anything more was intended to be given them, the testator could have so said. We must construe the will and codicils together—the last codicil ratifies and confirms the will that gave N. H. Brown and Tulie C. Brown, father of Bruce Brown, nothing, and the will refers to the contracts in which they agree that they have received their full share.

It is said in *Patterson v. McCormick,* 181 N. C., at p. 313: "It must be construed, 'taking it by its all four corners' and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant. We can derive but little help from adjudicated cases upon facts more or less different from those in this case, for hardly ever can the facts and the language be identical in any two cases. In the construction of a will, therefore, 'Every tub must stand on its own bottom,' except as to the meaning of words and phrases of a settled legal purport. The object is to arrive at, if possible, the intention and meaning of the testator as expressed in the language used by him." *Edmonson v. Leigh,* 189 N. C., 196; *Scales v. Barringer,* 192 N. C., 94; *Walker v. Trollinger,* 192 N. C., 744.

For the reason given the judgment below is
Affirmed.

W. J. ENNIS, R. B. CROWDER AND WIFE, MRS. E. E. CROWDER; S. E. WILLIAMS AND WIFE, MRS. SUSANNA WILLIAMS; A. N. MATHEWS AND WIFE, MRS. SALLIE MATHEWS; MRS. NANNIE ENNIS, WIDOW OF W. F. ENNIS, DECEASED; A. C. ENNIS AND CHESTER L. ENNIS, WHO IS A MINOR, AND APPEARS HEREIN BY HIS DULY APPOINTED AND ACTING GUARDIAN, MRS. NANNIE I. ENNIS, v. W. V. ENNIS, B. F. McLEOD, TRUSTEE, BANK OF BUIE'S CREEK, A CORPORATION, AND THE FEDERAL LAND BANK OF COLUMBIA, S. C., A CORPORATION.

(Filed 14 March, 1928.)

Adverse Possession—What Constitutes Color of Title.

As to whether a deed is champertous which conveys to the grantor's son certain described lands, reserving to the grantor and his wife a life estate, given in consideration of the grantee's successfully maintaining a suit to clear the title to the lands conveyed, *quere?* and, *Held,* the deed is sufficient color of title after registration and after the falling in of the reserved life estate, to ripen the title in the grantee after seven years adverse possession of the land, held openly and notoriously and under known and visible metes and bounds.

APPEAL by plaintiffs from *Grady, J.* (at Chambers in Smithfield, 14 December, 1927). From HARNETT. Affirmed.

The judgment of the court below is as follows:

"This cause came on for hearing at Smithfield, N. C., on 14 December, 1927, all parties being represented by counsel, and the case was submitted for judgment upon the pleadings and admissions of the parties made at the hearing; and upon said admissions the following facts are found to be true:

"The plaintiffs are the heirs at law of A. J. Ennis, who died intestate in Harnett County during the month of March, 1916.

"Some years prior to his death the said A. J. Ennis borrowed certain moneys from one John A. Matthews, and a deed was made to said Matthews by said A. J. Ennis and wife, with the understanding at the time that said deed was to operate as a mortgage deed, and thereafter the debt intended to be secured thereby was paid off, and a deed demanded of said Matthews by the grantors in said deed; but said Matthews refused to reconvey said lands to the said A. J. Ennis.

"On 13 March, 1911, said A. J. Ennis and wife executed a deed to the defendant, W. V. Ennis, conveying to him the lands theretofore conveyed to said John A. Matthews, in which the following recitals appear:

" 'Whereas, the parties of the first part executed and delivered to John A. Matthews in the year 1895 a deed for certain tract of land upon certain conditions, if complied with by the parties of the first part, it was to be conveyed back to them; and whereas the parties of the first part offered to comply with the conditions and demanded a deed of the said land; and whereas the said John A. Matthews refused to convey the same back to them; now, therefore, the parties of the first part, in consideration of the party of the second part agreeing to prosecute a suit for the said land in the Superior Court of Harnett County for the recovery of said land, and for the further consideration of the love and affection we have for the said W. V. Ennis (our son), the parties of the first part have bargained and sold,' etc.

"Then follows the conveying clause and description of the lands, all of which will appear by reference to said deed, which is recorded in the register's office of Harnett County, in Book No. 5, at page 21; and the said deed as registered is made a part of this finding of fact. (In *habendum* to deed: 'To have and to hold the above-described land subject to our life estate unto the said W. V. Ennis, his heirs and assigns forever.')

"After the execution of said deed the defendant, W. V. Ennis, caused a suit to be brought against John A. Matthews in the Superior Court of Harnett County, in which A. J. Ennis was the plaintiff, and a judgment was rendered therein declaring the said A. J. Ennis the owner of said lands, which suit was brought pursuant to the agreement contained in the deed above referred to. The judgment was docketed on 28 November, 1913, and the deed from A. J. Ennis and wife to W. V. Ennis was filed for registration on 20 November, 1913.

"After the death of A. J. Ennis the defendant, W. V. Ennis, entered into the possession of said lands, and held the same continuously, adversely, under said deed, and under known and visible boundaries up to the present time.

"Catherine Ennis, wife of A. J. Ennis, died in the early part of the year 1916.

"At the time of his death the said A. J. Ennis left surviving him certain of the plaintiffs and ancestors of the plaintiffs, as his only heirs at law, all of whom were at that time over 21 years of age, and under no disability.

"This suit was started on 26 November, 1927, more than eleven years after the death of A. J. Ennis, the grantor in said deed.

"Upon the foregoing facts the court is of the opinion:

"First. That the contract between A. J. Ennis and W. V. Ennis was not champertous nor affected by maintenance as alleged in the complaint.

"Second. That the plaintiffs' cause of action, if any they ever had, is barred by the statutes of limitations.

"Wherefore, it is now considered by the court, ordered, adjudged and decreed, that the defendant, W. V. Ennis, is the owner of the lands described in the complaint, in fee simple, subject to the rights of his co-defendants as lien-holders; and it is further adjudged that the plaintiffs are barred by the statutes of limitations, and this action is therefore dismissed, and the costs of the same will be taxed against the plaintiffs and C. H. Briggs, the surety on their prosecution bond."

Charles Ross and John R. Hood for plaintiffs.
Young & Young for W. V. Ennis.
B. F. McLeod for Federal Land Bank of Columbia.
Smith & McLeod for Bank of Buie's Creek.

CLARKSON, J. The plaintiffs present the question: "Whether or not a deed from a father to a son, setting out in the face of the deed as consideration, the obligation of the son to institute and finance a suit in the father's name, is void by reason of the violation of the law of champerty and maintenance." It may be noted that the consideration is to "prosecute" a suit for the recovery of the land and also the further consideration of "love and affection," and the land is deeded subject to a life estate of the grantor, father, and his wife Catherine. This interesting question we think unnecessary for a decision of the action.

The admissions in the record disclose: "After the death of A. J. Ennis the defendant, W. V. Ennis, entered into the possession of said lands and held the same continuously, adversely, under said deed, and under known and visible boundaries up to the present time. Catherine Ennis, wife of A. J. Ennis, died in the early part of the year 1916. At the time of his death the said A. J. Ennis left surviving him certain of the plaintiffs and ancestors of the plaintiffs, as his only heirs at law, all of whom were at that time over 21 years of age, and under no disability. This suit was started on 26 November, 1927, more than eleven years after the death of A. J. Ennis, the grantor in said deed."

The defendants in their answer set up as a bar to the action: "That the plaintiffs' cause of action, if any they had, arose and accrued more than seven years prior to the commencement of this action, and the defendants expressly plead the seven-year statute of limitations in bar of their recovery; the defendant, W. V. Ennis, having been in possession of said lands under known and visible metes and bounds and occupied same adversely to the world."

C. S., 428, is as follows: "When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability."

Color of title is defined by *Hoke, J.*, in *Smith v. Proctor,* 139 N. C., at p. 324: "Is a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." A deed to which the privy examination of the married woman is not taken is color of title. *Norwood v. Totten,* 166 N. C., p. 648, and cases cited. *Barbee v. Bumpass,* 191 N. C., 521; *Booth v. Hairston,* 193 N. C., 278.

In *Garner v. Horner,* 191 N. C., at p. 540, it is held: "Failure to comply with C. S., 2515, renders a deed void, although it is good as color of title. *Best v. Utley,* 189 N. C., 361"; *Whitten v. Peace,* 188 N. C., 298.

"Adverse possession, which will ripen a defective title, must be of a character to subject the occupant to action." *Smith v. Proctor, supra,* at pp. 324-25.

It is admitted that the parties, claimants, were *sui juris.* They could have brought an action against W. V. Ennis, who was in possession "under known and visible lines and boundaries," within the seven years, but they failed to do so.

We have held that a married woman's deed, without privy examination or failure to comply with C. S., 2515, although void, is color of title. Under the definition given of color of title, conceding but not deciding that the deed "professes and appears to pass the title, but fails to do so," yet it is color of title. It was on record and the plaintiffs had notice of it. Under the facts and circumstances of this case the plea of seven years statute of limitations is a bar to the action. *Dill Corporation v. Downs, ante,* 189.

For the reasons given the judgment is

Affirmed.

J. E. WILLIAMS, EXECUTOR OF A. F. WILLIAMS, SR., v. ELIZA W. BEST ET AL.

(Filed 14 March, 1928.)

1. **Wills—Rules of Construction in General.**

A will does not admit of judicial interpretation when the words and phrases therein used, taken in their ordinary meaning in connection with the subject-matter, and from the writing as a whole, clearly and unmistakably express the testator's intent as what part of the estate each designated beneficiary is to receive thereunder.

2. **Same.**

In construing a will the courts will reasonably reconcile apparent repugnancies, when this can be reasonably done; and to admit a legal interpretation of apparently conflicting intents the conclusion reached must be convincing.

3. **Wills—Construction—Nature of Estates and Interests Created.**

Where the testator bequeaths to his wife his property for life "without bond" and "gives" her the personalty of the estate "together with rents" from certain of his lands, and provides that at her death the lands shall be sold and the proceeds equally distributed between their children, and this appears in one clause of the will in connected sequence: *Held,* the word "give" applies to all the personalty bequeathed to the wife and the limitation over to the children equally applies, thus giving the wife only a life interest in the personalty other than that to be derived from the sale of the lands specified.

CONNOR, J., did not sit.

APPEAL by Mary W. Millard, a defendant, from *Harris, J.,* at January Term, 1928, of DUPLIN.

A. F. Williams, Sr., late of Duplin County, died during the month of May, 1926, leaving Rosalind J. Williams, his widow, and the following named children as his only heirs at law, to wit: Mary W. Millard, Eliza W. Best, Rosalind W. Bryan, Albert F. Williams (Jr.), Estelle W. Sparks, and Lucile W. Elliott.

On 19 April, 1922, he made a will appointing the plaintiff his executor, and on 12 May, 1926, the will was duly admitted to probate in common form. It contains the following provisions: "Revoking all former wills by me made, I give all my personal property of every kind to my beloved wife, Rosalind J. Williams, together with the use of, and the rents from all of the real estate that I may be possessed of at the time of my death without bond, during her life. After the death of my beloved wife, it is my wish and desire that all of my real estate, except the Witherington lands, be sold by my executor, after due advertisement, and the proceeds arising from such sale and all other funds belonging to my estate be equally divided between my children, Eliza W. Best, Rosalind W. Bryan, Albert F. Williams, Estelle W. Sparks and Lucile W. Elliott, in equal shares, and to my daughter, Mary, I give the sum of five dollars, and no more." The plaintiff brought suit to obtain the advice of the court relative to the construction and legal effect of this clause, the primary question being whether the testator bequeathed to his wife his personal property absolutely or only for her life. The trial court being of opinion that she took only a life estate in the personal property, gave judgment accordingly, from which upon exceptions duly entered the defendant, Mary W. Millard, appealed.

Gavin & Boney and Beasley & Stevens for appellant.
Connor & Hill for other devisees.

ADAMS, J. If a devise is set forth in clear and unequivocal language there is no occasion for judicial interpretation; but if doubt exists resort may be had to certain arbitrary canons of construction which are designed to give a definite meaning to particular forms of expression. The fundamental object of construction is to ascertain and give effect to the intention of the testator as declared in his will; and in seeking to discover his intention we must inspect all the provisions in the light of the presumption that the testator used words in their ordinary sense and that every part of the will indicates an intelligent purpose. If possible apparent repugnancies must be reconciled, for, as suggested in *Dalton v. Scales,* 37 N. C., 521, it is not to be admitted, unless the conclusion is irresistible, that the testator had two inconsistent intents. And no less pertinent is the principle that words, phrases, or clauses used in one part of a will may be explained, controlled, or limited in their application by the language employed by the testator in another part of the same instrument. *Campbell v. Cronly,* 150 N. C., 469; *Satterwaite v. Wilkinson,* 173 N. C., 38; *McIver v. McKinney,* 184 N. C., 393; *Gordon v. Ehringhaus,* 190 N. C., 147; *Scales v. Barringer,* 192 N. C., 95.

Let us apply these familiar principles in our endeavor to ascertain the testator's intention with respect to his personal property—specifically whether he bequeathed it to his wife without limitation or only for her life; for upon a proper determination of this question the rights of the parties depend. The disposition of his personal property and of the rents from and the use of his real estate is expressed in these words: "I give all my personal property of every kind to my beloved wife, Rosalind J. Williams, together with the use of, and the rents of all of the real estate that I may be possessed of at the time of my death without bond, during her life." This item reveals several significant facts: There is one sentence; only one "disposing word"—the word "give," which applies equally to the personal property, the rents, and the use of the land; the last words, "during her life," are set apart and given a place which apparently indicates an intent that they should limit and define the quantity of the entire preceding gift; and immediately preceding these are the words "without bond."

The personal property is bequeathed "together with" the rents and use of the real estate—*i. e.,* along with, or in union or combination with the latter. The expression is copulative, connecting the two gifts. In a case entitled *Anonymous,* 3 N. C., 161, it is recorded that the testator had devised to his wife a slave "and also lands for life"; and the court held that the words "and also" continued the clause and that the limitation "for life" referred to all that preceded. In *Black v. Ray,* 18 N. C., 334, the contested clause of the will was as follows: "To my dearly beloved wife, Effy Black, I bequeath (certain slaves), and my horses, and one-half of my cattle; my hogs, sheep, and household furniture; my plantation, with all the lands adjoining to it, during her lifetime." *Ruffin, C. J.,* construed the devise in these words: "The gift of the slaves and land, and all the other articles, is in the same sentence. There is but a single disposing word, 'bequeath,' in the beginning of the clause, which extends to each thing given; and there is but one expression directing the quantity of estate, 'during her lifetime,' which is in the end of it, and necessarily controls the interest in each subject of the gift." Concerning this interpretation *Nash J.,* afterwards remarked in *Williams v. McComb,* 38 N. C., 450, "No other construction could be placed on the words, with any regard to the ordinary rules of construction." These cases bear directly upon the point in question, and the application of the principle therein announced is specially appropriate here because fortified by other parts of the will now under consideration. Why insert the words "without bond" if the testator intended that the legatee should have the unqualified ownership of the personal property? The object of a bond, if it had been required, would evidently have been the preservation of the personal property during the life of the legatee and its subsequent delivery to those entitled at her death.

Equally significant is the testator's direction that all his real estate, except the Witherington lands, should be sold after the death of his wife and that the proceeds arising therefrom and "all other funds" belonging to his estate should be equally distributed among the five designated children. The personal property, we are informed, consisted chiefly of money, securities, and other evidences of debt, each of which falls within the accepted definition of the word "funds." In view of these facts and of all the circumstances existing at the time the will was executed, we are convinced that the distribution of "all other funds" included the personal property devised to Mrs. Williams. The phrase, "belonging to my estate," signifies nothing more than composing a part of "my estate," which as used here embraces both real and personal property. *Powell v. Woodcock,* 149 N. C., 235; *Reid v. Neal,* 182 N. C., 192. Our conclusion is that Mrs. Williams acquired only a life estate in the personal property bequeathed her, and that after her death it was subject to division as provided in her husband's will. The judgment is

Affirmed.

CONNOR, J., did not sit.

STATE v. DICK McLAWHORN AND LEVY MANNING.

(Filed 14 March, 1928.)

Criminal Law—Evidence—Character Evidence.

When a character witness states within the rule that the defendant, tried for violating the prohibition law, was a man of bad character, and voluntarily adds, "I have had several reports on him," and it is made to appear that the opinion of the witness was not based on such reports: *Held,* not reversible error. *S. v. Butler,* 177 N. C., 585, cited as controlling; *S. v. Mills,* 184 N. C., 694, cited and distinguished.

CRIMINAL ACTION, before *Lyon, J.,* at October Term, 1927, of PITT.

The defendants were tried upon bills of indictment charging them with the manufacture and possession of intoxicating liquor. The jury returned a verdict of guilty as to each defendant, recommending mercy. From judgment pronounced upon the verdict the defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Albion Dunn for defendants.

PER CURIAM. A witness for the State was asked the following question: "Do you know the general reputation of Dick McLawhorn prior to this?" The witness replied: "Why it's bad for making and selling whiskey. I have had several reports on him." The defendant McLawhorn objected to the last part of the answer, and moved that it be stricken out. The trial judge denied the motion, and the defendant excepted and assigned the ruling as error. In support of the validity of the exception the defendants relied upon *S. v. Mills,* 184 N. C., 694. We do not think the *Mills case* applicable. In that case it affirmatively appeared that the witness did not profess to know the general reputation of the defendant, stating, "All I can tell you is the report to me what people said to me. He was reported to me as a man handling liquor."

In the case at bar the witness makes a positive declaration as to the reputation of the defendant, and it does not appear that his knowledge of the reputation of the defendant was based entirely upon such reports. It further appears that the portion of the answer objected to was a voluntary statement of the witness. In our opinion the principle announced in *S. v. Butler,* 177 N. C., 585, is determinative of the merit of the exception.

There are other exceptions in the record, but upon examination of them we are of the opinion that they are not of sufficient importance to warrant a new trial.

No error.

PORTER & PECK v. WEST CONSTRUCTION COMPANY.

(Filed 21 March, 1928.)

1. **Contracts—Evidence—Extrinsic Evidence—Intent of Parties.**

   Where a written contract between the parties is susceptible of explanation by extrinsic evidence, and substantially incorporates previous correspondence, an instruction is not reversible error that the jury could consider the correspondence in arriving at the intention of the parties.

2. **Trial—Verdict—When Request for Directed Verdict Properly Denied.**

   A request for an instruction directing a verdict upon conflicting evidence is properly refused.

3. **Contracts—Action for Breach—Damages Waived.**

   In an action to recover the contract price for the construction of a highway, specifying a time limit for its completion, damages for the failure of the contractor to complete the work within the time specified is not recoverable when the evidence discloses that no claim was made therefor.

4. **Contracts—Performance—Acceptance of Performance—Evidence.**

In an action to recover the contract price for the building of a highway wherein the question of the acceptance of the work was involved, the refusal of the court to instruct the jury that a certain employee was not authorized to accept the work is not error when there is evidence that it was acquiesced in by one authorized to accept it.

5. **Instructions—Subject-Matter—Agreement of Parties.**

Where the attorneys of the parties litigant have by agreement written out their respective contentions and submitted them to the court without any objection taken at the time, it may not be successfully contended after verdict that it was erroneous for the trial judge in his instructions to give some of the contentions of the opposing party to the jury.

APPEAL by defendant from *Lyon, J.,* at October Term, 1927, of PITT. No error.

Prior to 7 April, 1922, the defendant entered into a contract with the State Highway Commission by the terms of which it was to build a road from the boundary line of Lenoir and Craven to Fort Barnwell in the latter county; and on 7 April, 1922, the plaintiff and the defendant, with the approval of the State Highway Commission, mutually executed a written contract by which certain work on the proposed road was sublet to the plaintiffs. The plaintiffs were bound by all the terms of the contract between the defendant and the State Highway Commission and were to do their work in strict conformity with its requirements. Alleging that they had completed the work in accordance with their contract, they brought suit against the defendant to recover the amount claimed to be due them, to wit, $2,178.36 with interest at 6% from 1 July, 1923. The defendant in its answer denied liability and alleged that the plaintiffs without cause had abandoned their contract and had left unfinished a considerable part of their work; that for this reason the defendant had been compelled to complete the contract and had thereby suffered loss in the sum of $4,912.22, for which the plaintiffs and their bond were liable. The case was referred and afterwards, upon exceptions filed to the referee's report, it came on to be heard in term, when the jury returned the following verdict:

1. Did the plaintiffs and the defendant enter into a contract for work to be done in and upon Highway No. 10, as alleged in the pleadings? Answer: Yes.

2. Did the plaintiffs perform their said contract, as alleged in the complaint? Answer: Yes.

3. Is the defendant, West Construction Company, indebted to the plaintiffs, and if so, in what amount? Answer: $2,176.36 with interest from 31 July, 1923.

4. Are the plaintiffs, Porter & Peck, indebted to the defendant, West Construction Company, and if so, in what amount? Answer: Nothing.

The plaintiffs admitted that they owed the defendant $1,476.15, and after deducting one amount from the other, including interest, the court gave judgment in favor of the plaintiffs for $886.14, with interest from 27 October, 1927, and the defendant appealed upon error assigned.

Skinner, Cooper & Whedbee and Albion Dunn for plaintiffs.

F. C. Harding, Cowper, Whitaker & Allen and Dawson & Jones for defendant.

ADAMS, J. On the hearing before the referee it was agreed by the parties that all objections to evidence not set out in their briefs should be deemed withdrawn, and at the trial in term the judge found as a fact that pursuant to this agreement the defendant had waived its first eighteen exceptions and, moreover, had not objected to the referee's report. As this finding is not subject to review we are not required to express an opinion on the merits of any of these exceptions.

The appellant requested this instruction: "The court further charges the jury that the contract between Porter & Peck and West Construction Company is in no wise modified or changed by either the letter written by West Construction Company to C. M. Upham, State Highway Engineer, dated 20 March, 1922, or by letter written to West Construction Company by Porter & Peck dated 11 February, 1922, being Exhibits C and B, respectively." The instruction was given with this addition: "but is only an interpretation of the contract." The qualifying phrase is the basis of the nineteenth exception.

Ordinarily a written contract merges antecedent correspondence and written instruments of prior date. The general rule is that where the entire contract is in writing and the intention of the parties is to be gathered from it, the effect of the instrument is a question of law, but if the terms of the agreement are equivocal or susceptible of explanation by extrinsic evidence the jury under proper instructions may determine the meaning of the language employed. *Young v. Jeffreys,* 20 N. C., 357; *Spragins v. White,* 108 N. C., 449; *Patton v. Lumber Co.,* 179 N. C., 103. While this principle is to be observed, we do not perceive how the defendant has been prejudiced by the introduction of letters which do not differ materially from the terms of the contract on which the defendant relies. In the letter written by the plaintiffs to the defendant on 11 February, 1922, the grading is said to include the flat grade only and neither the subgrade for paving nor the building of the shoulders; in the contract the plaintiffs agree to bring the grade within one-tenth of one foot (changed to two inches) of the finished grade for the full width of the entire roadway, "finishing the surface flat." In the letter written by the defendant to the engineer on 20 March, 1922, the only apparent inconsistency is found in the two phrases used by the defendant in referring to its part of the work—"building the shoulders" and "finishing the shoulders." As admitted by the defendant in its brief, the plaintiffs were to grade the entire width of the roadway, but no part of this grading is known as building shoulders; when the pavement is laid the outer edges of the subgrade are made level with the pavement, and "building or finishing the shoulders" is a term used to describe this work. This the parties apparently understood. The plaintiffs offered evidence that they had laid the flat surface according to the contract, and the defendant contended that its principal trouble was the character of their work.

Exceptions 33, 35, 36 may be considered in connection with exception 20, which is directed to his Honor's refusal to give this instruction: "If the jury shall find the facts to be as testified to in this case they will find that the plaintiffs did not perform their contract, and therefore they will answer the second issue "No."

The appellant stresses this exception as the most vital point in the appeal, and it may be granted that there is an array of evidence which tends to support its contention. But the determinative point is whether there is any evidence on the other side; if there is, no error was committed in refusing to give the prayer. There is at least some evidence that the plaintiffs completed the work they had contracted to do, as may be seen by reference to the testimony of Porter, Peck, and Sowell; and this evidence we cannot disregard. True, the contract provided for completion within one hundred working days of the work that was sublet, and the defendant insists that according to the plaintiffs' own evidence the time had expired long before the work was done; but on the other hand L. B. West testified on behalf of the defendant: "We made no claim against Porter & Peck for holding up the contract. I don't know just how long Porter & Peck took to do the work they did; that is, how many working days." . . . "The difficulty we had with them was to get them to comply with that clause in the contract that required them to bring the cuts and fills to within two inches of the finished grade, so that the cuts and fills would balance out in each 100-foot station. That was our main trouble with Porter & Peck." This, in effect, is an admission on the part of the defendant that it sought no damages against the plaintiffs for delay in performing their contract. These exceptions, therefore, are not meritorious, and from this view of the evidence it follows that the answer to the third issue is not, as the defendant contends, necessarily in conflict with the answer to the second.

The defendant requested an instruction that Embrey, an employee of the defendant, had no authority to accept partial performance of the plaintiffs' contract or to decide whether its contract had been performed. The prayer was refused and the defendant noted its twenty-first exception. This instruction was precluded by Porter's testimony that he was present when Embrey told West, the president of the defendant company, that he had accepted the grade, and that neither West nor any one for him had demanded or insisted that the plaintiffs should build the shoulders.

The contentions of the plaintiffs and those of the defendant were reduced to writing by their respective attorneys and in connection with the charge of the court they were submitted to the jury without exception or objection noted at the time; but the defendant now insists that exceptions 24 to 32, which are addressed to contentions prepared by the plaintiffs should be sustained. This position is not tenable. If the statement of the plaintiffs was objectionable the defendant in apt time should have made known its objection in order to give the judge an opportunity to correct the error or inadvertence. It has often been said that such objection will not be entertained if made for the first time after verdict. *S. v. Johnson,* 193 N. C., 701; *Proctor v. Fertilizer Co.,* 189 N. C., 243; *S. v. Ashburn,* 187 N. C., 717; *S. v. Reagan,* 185 N. C., 710; *Snyder v. Asheboro,* 182 N. C., 708.

The remaining exceptions are formal. We find

No error.

A. J. BRINSON v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, THE UNION CENTRAL LIFE INSURANCE COMPANY, AND THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 21 March, 1928.)

Insurance — Disability Clauses — Evidence Held Sufficient to Overrule Motion of Nonsuit.

Under the terms of a policy of insurance providing for payment to the insured of certain sums of money in the event of his becoming wholly disabled by bodily injury or disease so as to render him permanently, continuously incapable of pursuing any and all gainful occupation: *Held,* the evidence in this case sufficient to sustain the verdict in favor of the insured, and overrule the defendant's motion as of nonsuit. *Buckner v. Insurance Co.,* 172 N. C., 762, cited and distinguished.

APPEAL by defendants from judgment of *Harris, J.,* at January Term, 1928, of DUPLIN. No error.

Actions to recover upon policies of insurance issued to plaintiff by the above-named defendants were, by consent of all parties, consolidated for the purpose of trial and judgment.

Each of said policies contains a provision, by the terms of which defendant agrees to pay to plaintiff certain sums of money, as stipulated therein, upon receipt of due proof that plaintiff has become wholly disabled by bodily injuries, loss of reason or disease, and will be permanently, continuously and wholly prevented thereby from pursuing any and all gainful occupations.

Plaintiff alleges that each of the defendants is liable to him by reason of the terms of said provision; this allegation is denied. There is no controversy as to the amount which plaintiff is entitled to recover of each defendant, if he has become, as he alleges, wholly disabled by bodily injuries or disease, and if he is permanently, continuously and wholly prevented thereby from pursuing any and all gainful occupations.

The issues submitted to the jury were answered as follows:

"1. Has the plaintiff, since 9 November, 1925, become wholly disabled by bodily injuries or disease, and will he be permanently, continuously and wholly prevented thereby from pursuing any and all gainful occupations as alleged in the complaint? Answer: Yes.

"2. If so, in what amount is the defendant, Jefferson Standard Life Insurance Company, indebted to plaintiff? Answer: $200.

"3. If so, in what amount is the defendant, Pacific Mutual Life Insurance Company, indebted to plaintiff? Answer: $966.66.

"4. If so, in what amount is the defendant, Union Central Life Insurance Company, indebted to plaintiff? Answer: $1,933.33."

From judgment on the verdict, that plaintiff recover of each defendant the amount of its indebtedness to him, as found by the jury, defendants appealed to the Supreme Court.

Gavin & Boney, R. D. Johnson and Joseph E. Johnson for plaintiff.

Brooks, Parker, Smith & Wharton and Beasley & Stevens for defendants.

CONNOR, J. The policies of insurance, upon which plaintiff seeks to recover in this action, were issued to him by the defendants herein, prior to 9 November, 1925, the day on which plaintiff sustained bodily injuries as alleged in his complaint. They were all in full force and effect on said day. Under provisions contained in said policies, defendants are liable to plaintiff for the amounts determined by the jury, if the plaintiff, as he alleges, became wholly disabled, on 9 November, 1925, by bodily injuries or disease, and since said day has been permanently, continuously and wholly prevented thereby from pursuing any and all gainful occupations.

Defendants assign as error the refusal of the court below to allow their motion, at the close of the evidence, for judgment dismissing the action as upon nonsuit.

In support of this assignment of error, defendants cite and rely upon *Buckner v. Insurance Co.,* 172 N. C., 762. The policy of insurance in that case contained the identical provision as that contained in the policies upon which plaintiff in this action seeks to recover. In that case plaintiff, a fireman on a locomotive engine, while his policy was in full force, lost his left hand, as the result of an accident. He testified that he had not been able to do any work since he lost his hand, and that the only work which he could do was such as could be done by a man with only one hand. It was held that he could not recover upon the policy, for although the evidence tended to show that he was prevented, by the loss of his hand, from pursuing the occupation of a fireman, it failed to disclose a total disability to pursue any and all gainful occupations. It is said in the opinion: "The authorities are practically unanimous that under the terms of this policy plaintiff cannot recover without showing a bodily injury that will incapacitate him not only from following his usual avocation of fireman, but also from pursuing any other gainful occupation. The language is too plain and the meaning too unmistakable to permit an enlargement of the terms of the contract by construction. It is unfortunate for the plaintiff, but 'it is so nominated in the bond.' "

The instant case, however, is readily distinguishable from *Buckner v. Insurance Co.* In that case, the bodily injury sustained by the plaintiff resulted only in the loss of a hand; there was no evidence tending to show that plaintiff's health had been injuriously affected by his bodily injury. Notwithstanding the loss of his hand, which prevented him from pursuing the occupation of a fireman, plaintiff was able, both physically and mentally, to pursue other gainful occupations, such as a man with only one hand could pursue. In this case, however, the evidence tends to show that plaintiff, as the result of his bodily injury, has lost not only the use of his hand and arm, but also that of his leg; and, further, that in addition to his bodily injuries, resulting directly from the accident, plaintiff has suffered and is now suffering from a disease, which incapacitates him from pursuing not only his occupation as a farmer, but also any other gainful occupation, in which effort, either physical or mental is required. The decision of this Court upon defendant's appeal in *Lee v. Insurance Co.*, 188 N. C., 538, fully sustains the ruling of the court below upon the motion for judgment as of nonsuit. See, also, *Taylor v. Southern States Life Insurance Co.*, 106 S. C., 356, 91 S. E., 326, L. R. A., 1917C, 910.

Defendants' assignments of error, based upon exceptions to the admission of evidence, in behalf of plaintiff, cannot be sustained. They present no questions which require discussion. We find no error in the rulings of the court to which defendants excepted. The judgment is affirmed. We find

No error.

STATE v. R. B. CROWDER.

(Filed 21 March, 1928.)

1. **Appeal and Error—Requisites and Proceedings for Appeal—Order Extending Time for Service of Case on Appeal—When Void.**

   An order made without notice to the parties by the judge beyond the term of the court and outside of the district, extending the time for the service of case on appeal is void.

2. **Certiorari—Nature of Grounds—When Certiorari Necessary to Bring Case Before Supreme Court.**

   When the case of the appellant cannot be made out and served in time to bring it up to the Supreme Court and docketed within its rules, for reasons for which he is not responsible, it is required that he should apply to the Supreme Court, then in session, for a writ of *certiorari* in apt time, and when he has depended solely upon a void order of the trial judge extending the time for the service of his case, which is excepted to, the case will be dismissed.

CRIMINAL ACTION, before *Nunn, J.*, at Fall Term, 1927, of VANCE.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Thomas M. Pittman, R. S. McCoin, D. P. McDuffee and Yarborough & Yarborough for defendant.

BROGDEN, J. The defendant was tried and convicted, and judgment pronounced on 16 October, 1927, and thereupon court adjourned. The defendant was allowed forty-five days in which to serve his case on appeal, and the State thirty days thereafter to serve counter-statement or exceptions. The record was voluminous. After the adjournment of court counsel for the defendant notified the court stenographer to prepare the transcript of evidence. The stenographer did not live in Henderson where the trial was had. The letter of counsel, notifying her to transcribe the evidence, through inadvertence, was put in the mail box of another person, causing a delay of ten days before the receipt thereof by the court stenographer. Thereafter, while engaged in transcribing the evidence, the stenographer suffered a severe cut on her right hand, which became infected, and resulted in depriving her of the use of her right arm for several days. Fearing that she would not be able to transcribe the evidence in time, of her own motion, she notified the judge who tried the case and who was then in another district. Without notice to the parties the trial judge sent an order on 12 November, enlarging the time for preparing statement of case on appeal for thirty days beyond the time fixed in the order of court at the time of the trial. The

Solicitor for the State, on 17 November, excepted to said order enlarging the time, and on 18 November served notice on the defendant that the State excepted to the order granting an extension of time for serving the case on appeal. The statement of case on appeal was served on the Solicitor on 29 December, 1927. The Solicitor filed exceptions. Thereafter, upon disagreement of counsel, the judge settled the case on appeal on 20 January, 1928. When the case was called for argument in this Court the State made a motion to dismiss the appeal. This motion must be granted and the appeal must be dismissed. The order of the trial judge, made out of the district and without notice to the parties, extending the time for filing the statement of case on appeal, was void. *Cox v. Boyden,* 167 N. C., 321; *S. v. Humphrey,* 186 N. C., 533; *S. v. Taylor,* 194 N. C., 738; *Bisanar v. Suttlemyre,* 193 N. C., 711. Indeed the trial judge in transmitting the order expressed grave doubt as to its efficacy.

The rules governing appeals are mandatory and not directory. Thus in *Womble v. Gin Co.,* 194 N. C., 577, the Court says: "The rules governing appeals are mandatory and not directory. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. They may not be abrogated or set at naught (1) by act of the Legislature *(Cooper v. Comrs.,* 184 N. C., 615, 113 S. E., 569); (2) by order of the judge of the Superior Court *(Waller v. Dudley, supra),* or (3) by consent of litigants or counsel *(S. v. Farmer, supra).* The Court has not only found it necessary to adopt them, but equally imperative to enforce them and to enforce them uniformly."

It does not appear from the record when the transcript of evidence was actually delivered to counsel for the defendant by the court stenographer. However, it does appear that the time specified in the original order for serving statement of case on appeal expired 1 December, 1927. On 18 November, 1927, or twelve days before the expiration of time, notice was served upon the defendant that the State excepted to any extension of time and to the order of the judge extending the time. The defendant, therefore, on 18 November, 1927, had an adequate remedy. This Court was in session. The Fifteenth and Sixteenth districts were called in this Court on 21 November, 1927, and the Seventeenth and Eighteenth districts were called on 28 November, 1927. Both of these districts were heard before the time expired for the defendant to file statement of case on appeal. It was therefore the duty of the defendant, if he had reason to believe that the statement of case on appeal could not be completed within the time prescribed in the original order, to have applied to this Court for a writ of *certiorari.* "A party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the party or his agent." *Womble v. Gin Co.*, 194 N. C., 579. The defendant, however, did not pursue or utilize the remedy prescribed by law, but apparently relied upon the void order extending the time. Under these circumstances and in obedience to repeated decisions of the Court, the State is entitled to have the appeal dismissed, and it is so ordered.

Appeal dismissed.

SECURITY FINANCE COMPANY v. W. H. MILLS, INDIVIDUALLY, AND TRADING AS MILLS TIRE COMPANY.

(Filed 21 March, 1928.)

1. **Bills and Notes—Requisites and Validity—Fraud in the Factum and Fraud in the Treaty—Effect Thereof.**

   Where in an action upon a note the defendant pleads and introduces evidence tending to show fraud in the treaty and acknowledges that he signed it, and the plaintiff claims as a purchaser in due course for value without notice, with evidence to support it, the plaintiff is entitled to recover upon the evidence in the absence of competent evidence tending to show that he had notice of the infirmity of the instrument at the time he had acquired it.

2. **Same.**

   A negotiable instrument procured by fraud in the treaty is voidable between the original parties and binding in the hands of innocent third parties, and one procured by fraud in the factum is absolutely void.

APPEAL by plaintiff from *Stack, J.*, at Third September Term, 1927, of WAKE.

Civil action to recover the amount due on six negotiable promissory notes executed by the defendant to the Brenard Manufacturing Company for a number of radio machines, said notes having been endorsed and sold to the plaintiff, according to its evidence and contention, in good faith, before maturity, for value and without notice of any infirmity in said notes or defects in the title of the party negotiating them.

The execution of the notes is not denied, but defendant alleges that he was induced to sign them, together with an agency contract, by the false and fraudulent representations of the agent of the Brenard Manufacturing Company, in that it was stated by said agent, with intent to deceive the defendant, that each of the radio machines sold to the defendant was equipped with a patent static rejecter or remover which would eliminate all static and enable the operator to pick up foreign broadcasting stations with ease, at any time of the day or night; whereas in fact no such rejecter exists.

The contract signed by the defendant at the time of the execution of the notes in suit contains the stipulation that "no verbal or other agreement not appearing herein shall be binding on you" (Brenard Manufacturing Company). There is no mention in said contract of a static rejecter of any kind. The defendant testified that he was able to read and write; that he did read the contract and notes before signing them, and that he knew their contents.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the plaintiff purchase the notes sued on before maturity and in good faith, and for value without notice of any infirmity in the notes or defects in title of the persons negotiating them? Answer: No.

"2. Was W. H. Mills, trading as Mills Tire Company, induced to buy the radio sets and induced to sign the contracts and notes in question by any fraudulent representations? Answer: Yes.

"3. What amount, if anything, is the defendant indebted to the plaintiff? Answer: Nothing."

Judgment on the verdict for defendant; plaintiff appeals, assigning errors.

J. L. Emanuel for plaintiff.
Eugene Mills and Thos. W. Ruffin for defendant.

STACY, C. J. The validity of the trial is called in question by numerous exceptions and assignments of error, but we shall not consider them *seriatim,* as it is necessary to award a new trial for failure of the court to instruct the jury as requested by the plaintiff in one of its special prayers, that if they found the facts according to the evidence or as it tends to show, the first issue should be answered in favor of the plaintiff.

Notwithstanding the defendant's plea of fraud in the treaty, and evidence tending to support it *(Furst v. Merritt,* 190 N. C., 397, 130 S. E., 40), we find no competent evidence on the record of notice to the plaintiff of such fraud prior to the purchase of the notes in suit. *Bank v. Burgwyn,* 108 N. C., 62, 12 S. E., 952. However, as the case goes back for another hearing, the defendant may yet show, if he can, such notice. *Bank v. Burgwyn,* 110 N. C., 267, 14 S. E., 623.

There is this important distinction between fraud in the treaty and fraud in the factum: Instruments procured by means of the former are voidable as between the original parties and binding in the hands of innocent third persons, while those induced by means of the latter are void. *Medlin v. Buford,* 115 N. C., 260, 20 S. E., 463. Nothing can be founded on an instrument that is absolutely void, whereas from those which are only voidable, fair titles may flow. *Furst v. Merritt, supra.*

New trial.

J. T. JEFFREYS v. B. A. HOCUTT AND WIFE, LUCILE HOCUTT, AND J. D. JEFFREYS AND WIFE, NANCY JEFFREYS.

(Filed 21 March, 1928.)

1. **Execution — Wrongful Execution — Rights and Liabilities of Parties After Execution Set Aside.**

   Where lands are sold under execution of a valid judgment and the purchaser has conveyed the same to another under a deed with full covenant and warranty of title, and the judgment debtor has successfully maintained his action to have the sale under execution set aside as void, the grantee in the deed from the purchaser at the execution sale is entitled in equity to subrogation of the rights of the execution creditor under the doctrine of an equitable assignment of such judgment to the extent that the lien thereof had been diminished.

2. **Husband and Wife—Abandonment—Liability of Husband to Guardian for Support of Abandoned Wife and Children.**

   Where the owner of lands living thereon abandons his wife and children, and leaves the State, and his wife and minor children without support, and another took and supported them and has purchased the lands from the purchaser under an execution sale, taking deed with full covenants and warranty of title, upon the return of the execution debtor and his successfully maintaining his suit to have the deeds declared void: *Held,* the one who took and supported them is entitled in the settlement to the moneys he has reasonably expended for the support and maintenance of the wife and children, and this may be set up as a counterclaim against a recovery for the rents and profits, and judgment may be rendered in the same action (C. S., 456, 507, 535, 519, 521, 522). C. S., 4447 and amendments; C. S., 1667.

APPEAL by plaintiff from *Cranmer, J.,* at Special November Term, 1927, of JOHNSTON. Affirmed.

The court below rendered the following judgment, in part: "That the exceptions of the defendants as to amount of rents and an amount for personal property charged to the defendant, Hocutt, while he was acting as guardian, and as such guardian was cultivating the lands in dispute, should be sustained. The court further finds as a matter of law, that the defendant, B. A. Hocutt, should account for rents of the lands from 11 April, 1924, up to the present, and that he is entitled as a matter of law to the counterclaim of all improvements placed upon said lands since that date, as well as taxes expended on said lands, together with the amount of money which he paid for said land on said 11 April, 1924, to wit, $1,408.35, with interest from that date until paid. The court finds that the evidence warrants the findings of facts of the referee in that the lands from 1924, unto the present was worth for each crop year the sum of $340, and the said amount with the interest due on the same will total as of this day the sum of $1,482.40. The court further finds that there is evidence to sustain the findings of the referee that the defendant, B. A. Hocutt, is entitled to a counterclaim the total amount as found by said referee in his itemized statement as filed in his report in this matter, to wit, the sum of $3,701.81, with interest from 11 October, 1927. It is therefore considered, ordered and adjudged, that the defendant, B. A. Hocutt, recover of the plaintiff, J. T. Jeffreys, the sum of $2,219.41, together with interest on the same from 11 October, 1927, and $75 of the referee's fee, but the cost of this action to be taxed by the clerk of this court, and including therein a fee of $150 for J. Ira Lee, referee in this matter against the defendants. That the foregoing judgment is declared a special lien upon the interest of the said J. T. Jeffreys, to wit: His life estate in the lands described in the pleadings in this cause."

The other necessary facts and assignments of error will be considered in the opinion.

Parker & Martin for plaintiff.
Leon G. Stevens and Winfield H. Lyon for defendants.

CLARKSON, J. (1) Plaintiff, J. T. Jeffreys, owned a life estate in about 186 acres of land in Wilder's Township, Johnston County, N. C. The remainder was owned by his minor children. (2) Early in the year 1920, prior to April, J. T. Jeffreys (fled the State) abandoned his wife, Octavia Jeffreys, who was an invalid, and minor children, leaving them without any means of sustenance or support. The defendant, B. A. Hocutt, is the brother of Octavia Jeffreys, the wife of plaintiff, J. T. Jeffreys, who, after the abandonment of his sister and her children, took them in his home and provided for and supported them and educated the two girls and expended some $12,000 more than the rents and profits of the farm. That B. A. Hocutt was appointed guardian on 20 September, 1920, for the minor children, and took charge of the land and used the rent and more in support and maintenance of the abandoned wife and children, and continued in possession of said land as such guardian until 11 April, 1924. (3) Bryant Rayborn, in the Superior Court of Johnston County, recovered a judgment against J. T. Jeffreys and J. D. Jeffreys, totaling in all $1,408.35. An execution was issued and the land sold by the sheriff and J. D. Jeffreys became the last and highest bidder. At the time plaintiff was a nonresident of the State. That on 11 April, 1924, J. D. Jeffreys and wife, Nancy Jeffreys, conveyed the life estate which he purchased at execution sale to B. A. Hocutt for $1,408.35. (4) The plaintiff, J. T. Jeffreys, returned to the State and brought this action 3 November, 1925, claiming the sale was void from the sheriff to J. D. Jeffreys and from J. D. Jeffreys and wife to B. A. Hocutt, and praying that he recover the possession of the land and $5,000 from B. A. Hocutt for rents for the years 1920 to 1925, inclusive.

The case was appealed to this Court. *Jeffreys v. Hocutt,* 193 N. C., p. 332. The facts were: "The execution issued on 14 December, 1921, was returnable to the February Term, 1922. This term began Monday, 20 February, and ended on Saturday, 4 March. The sale was made on the first day of the next term, which was 13 March, the plaintiff laying no claim to a homestead exemption." This Court held that the sale of land made after the execution expired was void.

After the above decision was rendered, the court below made an order which in part is as follows: "It is therefore considered, ordered and adjudged that J. D. Jeffreys be, and he is hereby subrogated to all rights of the plaintiff, Bryant Rayborn, in a certain judgment, which is duly docketed in the clerk's office of the Superior Court of Johnston County, in Judgment Docket ...., page ...., as aforesaid; and it appearing to the court that J. T. Jeffreys has paid no part of said judgment, but he claims before this court that J. D. Jeffreys is entitled to account for rents off of the lands for a certain number of years." The plaintiff excepted to this order.

The matter was referred to J. Ira Lee, referee, who filed his report and defendants made certain exceptions which were heard by the court below, and the finding of fact and conclusions of law are set forth in the judgment above set forth.

It is not disputed that the plaintiff, J. T. Jeffreys, owed the Bryant Rayborn judgment, treated on the record, amount due $1,408.35, as of 11 April, 1924. This judgment was a lien on plaintiff's land, life estate. This judgment was against plaintiff J. T. Jeffreys and defendant J. D. Jeffreys. J. D. Jeffreys purchased the land under execution for $1,408.35, and in turn sold it to B. A. Hocutt for the same amount. At the instance of plaintiff both deeds were declared void.

Plaintiff still owes this debt. All are parties to the action and all the facts of the entire matter are set forth in the pleadings and proper relief prayed for. J. D. Jeffreys prays for judgment against plaintiff for $1,408.35 and admits he gave a warranty deed to Hocutt, and if the deed to him at the execution sale was void he would owe Hocutt $1,408.35 and interest. B. A. Hocutt alleges that he purchased the land without knowledge of any defect in the title, sets up J. D. Jeffreys' warranty, and if the deed be declared void that J. D. Jeffreys would owe him $1,408.35.

The principle is set forth in *Perry v. Adams,* 98 N. C., at p. 172, as follows: "The plaintiff, however, undertook to purchase the land, so far as appears, in good faith, and to the extent that the money he paid to the administrator was applied to the payment of debts of the intestate and the costs of administration that the personalty was insufficient to pay, to the extent he relieved the land in question, and is entitled to be subrogated to the rights of the creditors, whose debts and costs were so paid, and to have the sum of money due him charged upon the land. It would seem unconscionable to allow the *feme* defendant in that case to have the land discharged of the debt due the plaintiff for money thus paid by him and applied to relieve the same," citing numerous cases. *Brown v. Harding,* 171 N. C., at p. 691; *Mfg. Co. v. Blalock,* 192 N. C., at p. 413.

In *Pub. Co. v. Barber,* 165 N. C., at p. 487-8, speaking of subrogation, it is said: "The doctrine is one of equity and benevolence, and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential and perfect justice between all the parties without regard to form, and its object is the prevention of injustice."

As to subrogation the clear right to the ownership of the judgment is in J. D. Jeffreys. The deeds, at the instance of plaintiff, have been declared void. Under the pleadings and facts and circumstances of this case, there is an equitable assignment of the judgment to B. A. Hocutt.

The referee found that B. A. Hocutt was entitled to the $1,408.35 and interest from 11 April, 1924, clearing land (destumping) $80 and interest, to pack barn $800 and interest, to tobacco barn $150 and interest, taxes from 11 April, 1924, to 11 October, 1927, $696 and interest, the whole amounting to $3,701.81. All the improvements were put on the land and taxes paid subsequent to the purchase by B. A. Hocutt 11 April, 1924, the $80 clearing (destumping) land was done prior. Plaintiff did not appeal from these findings of the referee. The exception was only to the $1,408.35 and interest which, for the reasons given, cannot be sustained. B. A. Hocutt was charged by the referee with rent from April, 1920, to 11 October, 1927, eight years at $340 a year, total $2,720 and interest, and personal property of plaintiff left on hand when he abandoned it and used by Hocutt, April, 1920, $90 and interest, total $3,423.10. The referee found that plaintiff owed B. A. Hocutt the difference of $278.71. The court below overruled the finding of the referee as to the entire eight years rent, $2,720 and interest, and the $90 personal property and interest, to be charged against B. A. Hocutt, and found that B. A. Hocutt should account for the rent from 11 April, 1924, up to the present, four years at $340 a year and interest, amount to the total of $1,482.40, which deducted from the $3,701.81, left $2,219.41, for which judgment was rendered B. A. Hocutt with interest from 11 October, 1927. The plaintiff excepted to the $90 personal property left on the place and which was used on the plantation by B. A. Hocutt, and also the counterclaim for the rents from April, 1920, to 11 April, 1924, four years rent at $340 a year and interest.

We think plaintiff's assignments of error cannot be sustained. J. T. Jeffreys, the plaintiff, fled the State and abandoned his wife and minor children. For the four years plaintiff was absent and not heard from, and no demand made by him for the premises, B. A. Hocutt, as guardian and agent, took the rents of the land and profits and expended it and more than $12,000 of his own money in the support and maintenance of the invalid, deserted wife and children, and even gave the two minor girls a college education at the expense of more than $6,000. The plaintiff owed a legal and moral obligation to support and maintain his wife and children.

In *Miller v. Marriner,* 187 N. C., at p. 457, it is held: "It seems to be settled that ordinarily a life tenant must pay the taxes and the interest on a mortgage indebtedness to the extent, at least, of the income which he receives from the property, but he is not bound to pay the principal of the mortgage."

In 27 R. C. L., under *Waste,* p. 1016, it is said: "There is, however, authority to the effect that allowing a farm to grow to weeds and lie untilled is waste."

C. S., 4447, is as follows: "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

This was construed in *S. v. Bell,* 184 N. C., p. 701, rendered 8 November, 1922, and it was there held: That wilful abandonment of the father of his children of the marriage is made a separate offense of like degree with that of his wilful abandonment of his wife.

Public Laws 1925, chapter 290, added a proviso to C. S., 4447, as follows: *"Provided,* that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years."

C. S., 1667, in part is as follows: "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife." *Vincent v. Vincent,* 193 N. C., p. 492.

In *Thayer v. Thayer,* 189 N. C., p. 507 (39 A. L. R., p. 428), it is said: "Nearly one hundred years ago, *Taylor, C. J.,* in *Kimbrough v. Davis,* 16 N. C., p. 75, said: 'The natural obligation of a parent to maintain his illegitimate offspring, cannot be doubted (Puffend 6, 4, ch. 11, sec. 6).' . . . 'Past seduction (says *Chancellor Kent)* has been held a valid consideration to support a covenant for pecuniary reparation; and the innocent offspring of a criminal indulgence has a claim to protection and support, which courts of equity cannot and do not disregard.' *Brown v. Kinsey,* 81 N. C., p. 245, and cases cited. The *Kimbrough case* was cited and approved in *Sanders v. Sanders,* 167 N. C., p. 318: 'There can be no controversy that the father is under a legal as well as a moral duty to support his infant children *(Walker v. Crowder,* 37 N. C., 487), and, if he has the ability to do so, whether they have property or not. *Hagler v. McCombs,* 66 N. C., 345. There is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces. *Burton v. Belvin,* 142 N. C., 153; *Kimbrough v. Davis, supra.*' "

The agreed statement of facts upon which the title to the land was solely considered in the prior decision passed upon by this Court, says: "That the other issues between the parties raised by the pleadings are collateral to the question of title, and are reserved for further orders of the court."

We think the matters can all be settled in one action. C. S., 456; C. S., 507; C. S., 535; also C. S., 519; C. S., 521; C. S., 522; *Cotton Mills v. Maslin, ante,* p. 12; *Cotten v. Laurel Park Estates, post,*........ 141 S. E., 339; *Thompson v. Buchanan, ante,* 155.

Under all the facts and circumstances of this case, it would be unconscionable and contrary to all principles of justice and equity to deny B. A. Hocutt his counterclaim against the plaintiff's claim for rents and profits of the land during the plaintiff's absence, when the proceeds were admittedly used to fulfil an obligation solely resting on plaintiff to support his wife and children whom he had deserted.

The court below has allowed the defendant's counterclaim or set-off to plaintiff's claim for rent and the $90 and interest, and this is supported by evidence. The judgment, under settled principles of law and equity, must be

Affirmed.

MRS. E. G. ARNOLD v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 21 March, 1928.)

Banks and Banking—When Bank Is Collecting Agent—Rights of Depositor and Bank in Course of Collection.

When a bank receives a check from its depositor for collection which is paid by the drawee, and the bank through which it has been paid in due course of collection and remittance has charged the amount to the account of the initial bank, which has since become insolvent, the agency for collection ceases upon the payment of the check and its acquisition by the bank to whom the initial bank had forwarded it, it thus becoming a purchaser for value in due course, without notice of any infirmity in the instrument, and the depositor under her unrestricted endorsement has recourse only against the bank in which she had thus deposited the check.

STACY, C. J., dissenting on the ground that a judgment as of nonsuit should not have been entered under the facts of this case.

APPEAL by plaintiff from *Grady, J.,* at November Term, 1927, of LEE. Affirmed.

Action to recover of defendant the proceeds of a draft, payable to and endorsed by plaintiff, and received, in due course of business, by defendant from the Banking, Loan and Trust Company of Jonesboro, N. C., for collection and credit to the account of said Trust Company. The amount of the draft was credited by defendant to the account of said Trust Company, and was thereafter presented to and paid by the drawee.

Plaintiff alleges that defendant collected said draft as her agent, and has wrongfully and unlawfully refused to pay to her, upon demand, its proceeds. This allegation is denied by defendant. Defendant alleges that it was the purchaser of said draft, for value and without notice, and is, therefore, not liable to plaintiff for its proceeds, or for any part thereof.

At the close of the evidence offered by plaintiff, defendant moved for judgment as of nonsuit. Motion allowed. From judgment dismissing the action plaintiff appealed to the Supreme Court.

Gavin & Teague and Hoyle & Hoyle for plaintiff.
Manly, Hendren & Womble and Seawell & McPherson for defendant.

CONNOR, J. The evidence offered by the plaintiff tended to show the facts to be as follows:

On 30 December, 1926, plaintiff, who resides at or near Jonesboro, N. C., deposited with the Banking, Loan and Trust Company of Jonesboro, a draft for the sum of $4,000, payable to her order, and drawn on the Continental Fire Insurance Company of New York City. This draft was received by plaintiff in payment of loss sustained by her by the burning of a house which was insured by a policy issued by said Fire Insurance Company. Plaintiff, as payee of the draft, first endorsed the same without restriction, as follows: "Mrs. E. G. Arnold." The amount of the draft was entered upon the books of the Trust Company at the request of plaintiff, to the credit of "Mrs. E. G. Arnold, Special Account." This credit was entered and given to plaintiff subject, however, to the payment of the draft by the drawee. At the time of the deposit, plaintiff had a checking account with said Trust Company. No checks have been drawn by plaintiff upon the special account, nor have any charges been made by the Trust Company to said account.

On the same day on which the draft was deposited with it, to wit, 30 December, 1926, the Banking, Loan and Trust Company of Jonesboro forwarded same to the defendant, Wachovia Bank and Trust Company, at Winston-Salem, N. C., for collection and credit to its account. The draft, bearing the endorsement of the payee, Mrs. E. G. Arnold, and of the Banking, Loan and Trust Company, of Jonesboro, was received by defendant on 31 December, 1926, and its amount credited to the account of said Trust Company. This account was subject to checks drawn by the Trust Company on defendant. The draft was forwarded in due course of business by defendant to its correspondent bank in New York City, and upon presentment to the drawee was duly paid on 4 January, 1927. If the draft had not been paid by the drawee, the account of the Trust Company with defendant would have been charged with the amount, pursuant to special contract between Trust Company and defendant, in accordance with which their business with each other was conducted.

On 8 January, 1926, the Banking, Loan and Trust Company of Jonesboro ceased to do business. It was adjudged insolvent; a receiver was appointed, who has taken over its assets. Between 30 December, 1926, the date on which the draft was forwarded by said Trust Company to defendant, and 8 January, 1927, the date on which it ceased to do business, because of its insolvency, the books of the Trust Company showed that it had to its credit with defendant, continuously, a sum in excess of $4,000. This credit included the proceeds of the draft collected by defendant. However, prior to 30 December, 1926, pursuant to its arrangement with defendant, the said Trust Company had from time to time forwarded checks and other items to defendant for collection and credit to its account, and had, from time to time, drawn checks on said account, which had been paid by defendant. Checks and other items credited to said account, if not paid, were chargeable to said account. Monthly statements were rendered by defendant to the said Trust Company, showing the state of the account.

In *Sugg v. Engine Co.,* 193 N. C., 814, this Court quoted, with approval, the rule stated by *Allen, J.,* in *Worth v. Feed Co.,* 172 N. C., 335, as follows: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper, and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement, or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection, and not a purchaser."

This rule, however, is not applicable in the instant case. Plaintiff alleges in her complaint that defendant collected the sum of $4,000 on the draft, which it received from the Banking, Loan and Trust Company of Jonesboro, bearing the unrestricted endorsement of plaintiff as payee. This allegation is admitted in defendant's answer. The evidence offered by plaintiff shows that the draft was paid.

The liability of the Trust Company to plaintiff, and of defendant to the Trust Company, after the payment of the draft, became absolute. Neither the Trust Company by reason of its special agreement with plaintiff, nor the defendant, by reason of its special agreement with the Trust Company, had the right, after the draft had been paid by the drawee and collected by them, to charge the amount of the draft to the account of its respective depositor. The draft having been paid, neither of these special agreements can be held to determine the rights and liabilities of the parties to this action with respect to the proceeds of the drafts. These agreements were effective only in the event the draft was not paid by the drawee, and determined the rights of the parties to the draft, prior to its final payment to defendant, in one case, and to the Trust Company in the other.

Conceding that until the payment of the draft by the drawee, and its collection by the defendant, the relation between the Trust Company and the defendant, with respect to the draft, was that of principal and agent, for collection, it is clear, we think, that after the payment and collection of the draft, and after its proceeds had been absolutely credited to the Trust Company by the defendant, this relation ceased to exist. The relation between them, with respect to the proceeds of the draft was that of creditor and debtor, or of depositor and banker. No notice was given by plaintiff herein to defendant that she claimed to be entitled to the proceeds of the draft, as against the defendant, until 28 February, 1927, more than a month after the Trust Company had ceased to do business, by reason of its insolvency. From the date of her deposit of the draft with the Trust Company to the date of its insolvency, plaintiff had a credit with the Trust Company which was subject to her check. If the draft had not been paid by the drawee and collected by the Trust Company, in the absence of negligence on its part with respect to its collection, the said Trust Company had the right, by reason of its special agreement with plaintiff, to charge her account with the amount of the draft; she would also have been liable to the Trust Company, in that event, by reason of her unrestricted endorsement of the draft. Her liability to the Trust Company ceased after it had collected the draft. This it did, when under its arrangement with defendant, the proceeds of the draft was credited to its account by defendants. Plaintiff is now a creditor of the Banking, Loan and Trust Company of Jonesboro, which is alone liable to her, as a depositor, for the amount of the draft.

Defendant, having received the draft from the Trust Company, who was the holder thereof by the unrestricted endorsement of plaintiff, as payee, without notice of equities, if any, of plaintiff as against the Trust Company, her endorsee, by reason of the credit on its books to the special account of plaintiff, or by reason of the special agreement that if the draft was not paid and collected, it should be charged back to said account, and having paid value for the draft by crediting its amount to the account of the Trust Company, became the holder of the draft in due course, as against the plaintiff, and cannot be held liable to her for its proceeds. The draft having been paid by the drawee, and its proceeds collected by the defendant, its liability to the Trust Company, by reason of its contract became that of a debtor, and not a collecting agent. See *Samuel Blacher v. National Bank of Baltimore* (Md. Ct. of App.), 135 Atl., 383, reported and annotated in 49 A. L. R., 1366. The fact that defendant collected the draft in the instant case, and thereby fully performed its duty as a collecting agency, and credited the account of its depositor, the Banking, Loan and Trust Company of Jonesboro, with its proceeds, distinguishes this case from *Malloy v. Fed. Res. Bank,* 281 Fed., 997. Defendant must now account to the said Trust Company or its receiver for the proceeds of the draft, and not to plaintiff, who by her unrestricted endorsement of the draft, negotiated it to the Trust

Company, who in turn negotiated it, by like endorsement to defendant, who thus became the holder, without notice of equities, and subsequently for value.

There is no error in the judgment dismissing the action as upon nonsuit. The judgment is

Affirmed.

STACY, C. J., dissenting: It seems to me that the rule with respect to considering the evidence in its most favorable light for the plaintiff, on a motion to nonsuit, has been reversed in this case, and that the more favorable inferences to be drawn therefrom have been given to the defendant.

There is evidence on the record tending to show that the Banking, Loan and Trust Company of Jonesboro (hereafter called the Jonesboro Bank), on 30 December, 1926, took the draft in question for collection as agent of the plaintiff, and forwarded the same to the Wachovia Bank and Trust Company (hereafter called the Wachovia Bank) at Winston-Salem, N. C., for collection, or "for collection and credit." The evidence further shows that the Wachovia Bank accepted said draft simply as agent "for collection" (R., p. 10), and in acknowledging receipt thereof denominated itself as such agent in the following language:

"(1) Items drawn on this bank not good at the close of business day may be charged back to depositors; (2) Items received for collection or credit and not drawn on this bank are taken at depositor's risk, and should the same be lost or should no returns be received within a reasonable time, such items may be charged back to depositor; (3) Items may be sent direct to bank upon which they are drawn or at which payable, or to or through collecting agents, for collection and remittance, and collecting agents shall have the right to send items direct to bank on which drawn or at which payable; (4) This bank and collecting agents may accept either cash or draft in payment of such items and will not be liable for failure to collect drafts so received; (5) Each collecting agent is the agent of depositor, but no agent shall be liable for any loss growing out of the neglect, default or failure of another agent; (6) Should any item be not paid or any agent fail to remit proceeds therefor, this bank may charge the item back to the depositor. Delivery to the bank of items for collection or credit shall constitute acceptance of the above conditions by the depositor, in the absence of written notice to the contrary at the time."

Under this evidence, as I understand it, the jury might well find, and would be fully warranted in finding, that no beneficial title to the draft in question ever passed to the Jonesboro Bank or to the Wachovia Bank.

It has been the insistent holding with us that as to whether a bank becomes a purchaser for value of a negotiable instrument, check or draft, or takes it as an agent for collection only, rests fundamentally in intent, and this is primarily a question of fact to be determined by the jury where the evidence is equivocal or susceptible to more than one inference. *Bank v. Rochamora,* 193 N. C., 1, 136 S. E., 259; *Finance Co. v. Mills Co.,* 187 N. C., 233, 121 S. E., 439; *Sterling Mills v. Saginaw Milling Co.,* 184 N. C., 461, 114 S. E., 756; *Temple v. LaBerge,* 184 N. C., 252, 114 S. E., 166; *Mangum v. Grain Co.,* 184 N. C., 181, 114 S. E., 2; *Moon-Taylor Co. v. Gray-Smith Mill Co.,* 176 N. C., 407, 97 S. E., 213; *Worth Co. v. Feed Co.,* 172 N. C., 335, 90 S. E., 295; *Bank v. Exum,* 163 N. C., 199, 79 S. E., 498; *Latham v. Spragins,* 162 N. C., 404, 78 S. E., 282; *Davis v. Lumber Co.,* 130 N. C., 174, 41 S. E., 95; *Cotton Mills v. Weil,* 129 N. C., 452, 40 S. E., 218; Note, 42 A. L. R., 492.

But it is stated in the Court's opinion that this principle is not applicable to the facts of the present case. Why not? If the proceeds of the draft in question had been attached in New York as the property of the plaintiff, the Wachovia Bank, being an agent for collection only, as appears from its acknowledgment of said draft, would have been relieved entirely from responsibility. When did the Wachovia Bank cease to be an agent for collection and become a purchaser for value of this draft? I do not think the record answers in such way as to warrant a dismissal of the action. It assumed responsibility as an agent for collection only, but having collected, it now claims the right to use said funds as an offset against its liability to the Jonesboro Bank, and this claim is upheld. Unless we are prepared to overrule the decisions above cited, and many others of like tenor, nothing else appearing, I think the plaintiff is entitled to have the case submitted to a jury.

LAMBORN & COMPANY v. HOLLINGSWORTH & HATCH.

(Filed 21 March, 1928.)

1. **Trial—Arguments and Conduct of Counsel—Unwarranted Abuse of Other Party.**

   It is within the sound discretion of the trial judge, not reviewable on appeal unless grossly abused, either upon motion made, or *ex mero motu* to prevent an attorney for a party litigant in his argument to the jury from exceeding his privilege in drawing unreasonable inferences, and thus unwarrantably abuse the other party, or his witnesses.

2. Contracts—Measure of Damages in Action for Breach—Resale and Mode of Resale.

Where the wholesale purchaser of sugar has breached his contract to receive barrel lots at his contract price, the seller, in his action thereon is entitled to recover the difference between the price so fixed and the fair market value, when a less amount, upon a resale after giving the purchaser sufficient notice of his intention to do so, which is disregarded.

CIVIL ACTION, before *Grady, J.*, at August Term, 1927, of CHATHAM.

On 4 June, 1920, the plaintiff, Lamborn & Co., sold to the defendants by written contract "75 barrels standard fine granulated sugar on the basis of 26 cents per pound f. o. b., Savannah Refinery, Port Wentworth, Ga., for fine granulated, shipments to be made as follows: One-third during June or July; one-third during August or September; one-third during September or October, if possible. Shipment at seller's option during period specified, subject to delay, if any."

This contract was signed by the defendant at Sanford, N. C., and forwarded to plaintiff at Savannah, Ga., by mail. The letter forwarding the contract stated: "You will find enclosed signed contract for 75 barrels of Standard Fine Granulated Sugar," etc. On 24 June, 1920, plaintiff shipped to the defendants 24 barrels of sugar. This shipment of 24 barrels was accepted by the defendant without objection and paid for. On 7 August, 1920, plaintiff shipped to the defendant 25 barrels of sugar, which was accepted without objection and paid for. On 9 October, 1920, the plaintiff shipped to the defendant 26 barrels of sugar. In the meantime the price of sugar had greatly declined. The defendant refused to accept the 26 barrels, contending that the shipment contained one barrel too many for that the allocation under the contract for September or October shipment was one-third of the total or twenty-five barrels. The plaintiff contended that the 26 barrels was the amount necessary to complete the contract, and that under the agreement the defendant had purchased 75 barrels of sugar and that shipment was at seller's option. The defendants refused to accept the sugar unless the plaintiff would deduct the price of one barrel. Thereupon the plaintiff notified the defendants that it would resell said sugar and charge the defendants with the difference. On 28 October the plaintiff notified the defendants that it had received an offer of 11 cents for said sugar, and that said offer was the best that could be obtained, and that unless defendants should furnish a better offer by 10 a.m., 29 October, 1920, they would sell the sugar at the price offered and hold the defendants liable for the difference between the contract price and the price obtained on resale, together with such other losses and expenses as the plaintiff would sustain by reason of the breach of contract. The defendants did not reply to this communication, and on 30 October, 1920, plaintiff sold the sugar to one Bobbitt in Sanford at a loss of $1,428.56. Included in this total loss were certain small items of expense for storage and telegrams, amounting to $46.11. All the evidence tended to show that the price of the sugar upon the resale to Bobbitt was the fair market value of sugar on the date of resale. The plaintiff made demand upon the defendants for the sum of $1,428.56, and upon refusal to pay, suit was instituted. There was a verdict for $1,428.56 in favor of plaintiff, and from judgment upon the verdict the defendants appealed.

Biggs & Broughton for plaintiff.
Seawell & McPherson and Williams & Williams for defendants.

BROGDEN, J. The record discloses: during the course of argument of counsel for defendants to the jury, counsel characterized the conduct of the plaintiff as being actuated by "avarice and greed," and referred to the contract as "unconscionable and oppressive," with other comments of like tenor. The court being of the opinion that neither the allegations in the answer nor proof offered in the case supported such argument, interrupted counsel with the statement that "the argument you are now making has nothing to do with the case."

The defendants excepted.

At the conclusion of all the argument, counsel for defendant handed up "what purported to be a statement of the argument he was making or purporting to make when interrupted by the court." The court thereupon stated to counsel that he could read the statement to the jury or proceed to make his argument to the jury as he had intended. Counsel declined to do either. Defendants excepted.

Under our law it is the undoubted right of counsel to argue every phase of the case supported by the evidence without fear or favor, and to deduce from the evidence offered all reasonable inferences which may flow therefrom. The testimony and conduct of witnesses and parties must at all times be subject to such criticism and attack as the circumstances reasonably justify. However, the baiting and badgering of witnesses and parties ought not to be permitted by the court. Parties come into court, as they have a right to do, to have controversies determined according to the orderly processes of the law, and witnesses are compelled to come to court whether they desire to do so or not. At all events, as long as they demean themselves in a courteous manner they are entitled to the same courtesy in the courthouse as would be accorded to a citizen in any other business transaction.

The general principle, established by many authorities, is to the effect that the comment of counsel upon the testimony and conduct of parties and witnesses "must be left, ordinarily, to the sound discretion of the judge who tries the case; and this Court will not review his discretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury." *Jenkins v. Ore Co.,* 65 N. C., 563; *S. v. Tyson,* 133 N. C., 698; *S. v. Davenport,* 156 N. C., 597; *Maney v. Greenwood,* 182 N. C., 579. Thus in *Massey v. Alston,* 173 N. C., 215, *Walker, J.,* delivering the opinion declared: "A party, or witness, should not be subjected unjustly to abuse, which is calculated to degrade him or to bring him into ridicule or contempt, and when this occurs he is clearly entitled to the protection of the court, when he asks for it in proper time, and sometimes, perhaps, when he does not, for the court should extend it voluntarily, in the exercise of its judgment and, if necessary, in order that the trial may proceed fairly and impartially and lead to a just result."

Also in *McLaurin v. Williams,* 175 N. C., 292, counsel, in the course of argument to the jury, was interrupted by the trial judge, who declared that he could not permit counsel to continue the line of argument he was then pursuing. This Court, in upholding the action of the trial judge, declared: "There was neither allegation nor issue presenting such proposition." The trial judge "is not a mere moderator, the chairman of a meeting, but the judge appointed by the law to so control the trial and direct the course of justice that no harm can come to either party," etc. *S. v. Davenport,* 156 N. C., 612.

There is nothing in the present record which indicates an abuse of that sound legal discretion committed by law to trial judges.

The contract between the parties was in writing and provided for the sale of 75 barrels of sugar, and was an entire contract for that number of barrels. The division of shipment into three portions of 25 barrels each, under the terms of the contract, was at the seller's option, and the defendants, upon receiving 24 barrels in June, made no protest that the shipment was one barrel short. By the same token they were in no position to protest when the price had declined, because the shipment was one barrel long, because it was the plain duty of the plaintiff under the contract to deliver to the defendant 75 barrels of sugar, and the plaintiffs undertook to deliver no more than that amount.

The court instructed the jury to answer the issue as to the breach of contract in the affirmative. This instruction was correct upon all facts and circumstances disclosed by the record.

Upon the second issue of damages the court charged the jury as follows: "I charge you that if you find the facts to be as testified to by all the witnesses who have come on the stand and testified, that is, if you believe these witnesses, if you believe that the plaintiff sold that sugar as testified to here, and after notifying the defendants of sale, and of the amount of the sale, and that the defendants paid no attention to it, and you find the facts so to be, it would be your duty to answer the issue $1,428.56." This instruction is sustained. If the defendants wrongfully refused to accept the sugar, the plaintiff had the right to resell it as agent of the defendants and to recover from them the difference between the contract price and that obtained on the resale, if the resale was made within a reasonable time, fairly conducted, with full notice and consummated in the exercise of utmost good faith. *Grist v. Williams,* 111 N. C., 53; *Heiser v. Mears,* 120 N. C., 443; *Clothing Co. v. Stadiem,* 149 N. C., 6; *Flour Mills v. Distributing Co.,* 171 N. C., 708.

The undisputed evidence disclosed that notice was duly given by the plaintiff to defendants, and that the sugar brought the market price at the resale.

No error.

CHARLES F. DUNN v. VICTORIA JONES.

(Filed 28 March, 1928.)

1. **Judgments—Setting Aside for Surprise, Excusable Neglect, etc.—Power of Trial Judge to Set Aside.**

   Upon a proper finding of a meritorious defense and excusable neglect, the judge of the Superior Court, on appeal from the clerk, has authority to set aside a judgment rendered by the clerk, against the defendant by default of an answer, to which exception has been duly entered, before the clerk, C. S., 600; and to permit an answer to be filed, C. S., 536.

2. **Constitutional Law—Vested Rights—Civil Procedure.**

   No vested right can be acquired under a statute which only relates to the procedure to be observed for the enforcement or the defense of a right.

3. **Statutes—Construction—Statutes Relating to Civil Procedure.**

   A new statute making a change only in procedure prima facie applies to all actions, whether already accrued at the time of its passage, or then pending or accruing in the future.

CIVIL ACTION, before *Cranmer, J.,* at November Term, 1927, of LENOIR.

Summons was issued and served 22 June, 1927, and complaint filed on the same date. The plaintiff sued the defendant for the possession of the land described in the complaint. The answer was filed according to the record on 13 June, 1927, nine days before the summons was issued. It is assumed, however, upon reading the judgment that this was an error, and that 13 July was the proper date upon which the answer was filed. On 18 July, 1927, the plaintiff made a motion before the clerk for judgment by default final upon the ground "that no defense bond nor was any answer filed within the time allowed by law." Judgment by default final was duly rendered by the clerk on 12 September, 1927. The defendant excepted to the judgment and appealed to the judge of the Superior Court. Notice of appeal was waived. Thereafter the cause was heard by E. H. Cranmer, judge presiding, who rendered the following judgment:

"This cause coming on to be heard before his Honor, E. H. Cranmer, judge, and being heard, and it appearing to the court that the defendant in the above-entitled action has a good and meritorious defense to said cause, and it further appearing to said court that the said defendant was ill and not physically able to attend her affairs or to file answer in this cause, and it further appearing to said court that the said defendant was guilty of no laches on her part, but was only guilty of such conduct as amounted to excusable neglect, and it further appearing to said court that on the day following the expiration of twenty days from the date of the service of the summons in this cause the said defendant filed her answer with proper bond in the sum of $200, with sufficient surety as is required by statute before the plaintiff in said action moved for judgment therein, and it further appearing to said court that the time to answer did not expire until after 1 July, at which time the act extending the time to thirty days went into effect;

"It is now, therefore, ordered, adjudged and decreed, on motion of Shaw & Jones, and J. F. Liles, attorneys for the defendant, that the judgment heretofore entered by the clerk of the Superior Court in this cause be, and the same is hereby declared void and set aside.

"It is further ordered, adjudged and decreed that the answer filed on behalf of the defendant in this cause, together with the bond, be and the same are hereby declared filed and allowed to be filed, and the said cause is retained to the end that the same may be heard upon its merits."

From the foregoing judgment plaintiff appealed.

Charles F. Dunn, in propria persona, for plaintiff.
Shaw & Jones for defendant.

BROGDEN, J. One phase of this controversy was disposed of by this Court in *Dunn v. Jones,* 192 N. C., 251. This case has been referred to as the rich young ruler case. The Court held that plaintiff's title was defective in the particulars pointed out in the opinion. Thereafter on 22 June, 1927, plaintiff instituted the present action in ejectment for the possession of the land. The plaintiff excepts to the judgment rendered by the court upon the ground that the trial judge had no power to set aside the judgment by default final rendered by the clerk. This contention cannot be sustained. When the judgment by default was entered by the clerk the defendant excepted and appealed to the judge.

Hence the whole case was regularly before the court upon the appeal. Both parties were thereupon fixed with notice of everything that was regularly done in the cause. *Foster v. Allison Corporation,* 191 N. C., 166. Under the law, the trial judge had the power in the exercise of his sound legal discretion to set aside the judgment under C. S., 600, and to permit the defendant to file an answer under C. S., 536. A judgment may be set aside under C. S., 600, if the moving party can show excusable neglect, and that he has a meritorious defense. In the case at bar the trial judge found all the necessary and essential facts to support his order vacating the judgment by default. *Norton v. McLaurin,* 125 N. C., 185; *Crumpler v. Hines,* 174 N. C., 283; *Jernigan v. Jernigan,* 179 N. C., 237; *Battle v. Mercer,* 187 N. C., 437; *Helderman v. Mills Co.,* 192 N. C., 626. In *Aldridge v. Ins. Co.,* 194 N. C., 683, the Court referring to Public Laws 1921, Ex. Ses., ch. 92; Public Laws 1923, ch. 53; Public Laws 1924, Ex. Ses., ch. 18, said: "These statutes have reference to the clerk and were not intended to impair the broad powers conferred on the judge, who 'may in his discretion and upon such terms as may be just allow an answer or reply to be made, or other act done, after the time limited or by an order to enlarge the time.'" *Roberts v. Merritt,* 189 N. C., 194; *McNair v. Yarboro,* 186 N. C., 111.

Moreover by chapter 66, Public Laws 1927, the time for filing answer was enlarged to thirty days. This act went into effect 1 July, 1927. Hence the answer was filed in proper time. "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions." *Stacy, C. J.,* in *Martin v. Vanlaningham,* 189 N. C., 656. The judgment rendered is amply supported by numerous authorities in this State.

Plaintiff in his brief says: "I take much pleasure in informing this Court that I have read every one of your reports from Vol. 140 to 193, inclusive, and with the hundreds of opinions, I have found nothing that in law would support the judgment sent up in this record." In view of the fact that the uniform holding of the Court supports the judgment rendered, the plaintiff's aforesaid declaration in the brief, calls to mind the colloquy between Philip and a notable citizen of Ethiopia, occurring long ago. The distinguished citizen of Ethiopia was undertaking to read the Book of the Law, and the great evangelist propounded to him this query: "Understandest thou what thou readest?" Acts 8:30.

Affirmed.

CHARLES M. INGRAM v. BANK OF WARSAW ET AL.

(Filed 28 March, 1928.)

1. **Principal and Surety—Nature and Extent of Liability of Surety in General.**

   The liability of sureties on a bond given by a bank as principal, to indemnify a depositor against loss for moneys deposited in the bank at the time of its execution, will not be construed by implication to extend beyond securing the deposit therein stated, and bonds of this character are to be strictly construed as to their expressed terms.

2. **Banks and Banking—Directors—Liability as Individual Endorser of Note Not Affected by Office.**

   Where it appears that sureties on a bond given by a bank to secure a depositor are directors of the bank, but that they signed in their individual capacity, their measure of liability is not increased by reason of their being directors of the principal obligor.

APPEAL by defendants from *Cranmer, J.*, at August Term, 1927, of DUPLIN. Reversed.

Action to recover on bond executed by the Bank of Warsaw as principal, and its codefendants, as sureties, to indemnify plaintiff from loss on account of certain funds deposited by him with the Bank of Warsaw.

The Bank of Warsaw was adjudged insolvent prior to the commencement of this action. No answer was filed to the complaint by its receiver. Judgment by default final was rendered against said receiver. There was no appeal from this judgment.

Answers were filed by the other defendants, admitting the execution of the bond by them as sureties, but denying liability in this action upon said bond.

The issue submitted to the jury was answered as follows: "In what sum, if any, are the defendants, sureties, indebted to the plaintiff? Answer: $7,188.72."

From judgment in accordance with the verdict, defendants, sureties on the bond, appealed to the Supreme Court.

A. McL. Graham, George R. Ward and Gavin & Boney for plaintiff.
H. D. Williams, R. D. Johnson and L. A. Beasley for defendants.

CONNOR, J. On 17 February, 1925, plaintiff, an ex-sheriff of Duplin County, whose term of office had expired in December, 1924, had on deposit with the Bank of Warsaw, Kenansville Branch, the sum of $30,988.48. The said sum was credited, partly to the account of "C. M. Ingram, Sheriff," and partly to the account of "C. M. Ingram, Sheriff, 1923 Tax."

In compliance with his request, the Bank of Warsaw on said day caused a bond to be executed and delivered to plaintiff in words as follows:

"North Carolina—Duplin County.

Know all men by these presents that we, the Bank of Warsaw and Kenansville, N. C., a corporation, and the undersigned sureties, are held and firmly bound unto Charles M. Ingram in the sum of thirty thousand dollars, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, in the amount set opposite our names.

Signed and sealed this the 17th day of February, 1925.

The condition of the above obligation is such that whereas Charles M. Ingram has certain funds deposited in the Bank of Warsaw, a corporation, and if the said Bank of Warsaw shall turn said funds over to said Charles M. Ingram, when demanded, then this bond to be null and void; otherwise in full force and effect.

BANK OF WARSAW, a Corporation. (Seal)
By H. L. Stevens, Pres. (Seal)

Attest:
J. K. POWELL, (Seal)
Secretary.

J. K. POWELL.	(Seal)	$2,500
H. L. STEVENS.	(Seal)	5,000
R. L. BEST.	(Seal)	5,000
JOHN FREDERICK.	(Seal)	5,000
J. A. POWELL.	(Seal)	2,500
J. W. QUINN.	(Seal)	10,000
JAS. J. BOWDEN.	(Seal)	2,500."

After the execution of said bond plaintiff made deposits from time to time with the Bank of Warsaw, which were credited, in accordance with his request, some to the account carried on the books of the bank, under the name of "C. M. Ingram, Sheriff," and some to the account carried under the name of "C. M. Ingram, Sheriff, 1923 Tax." Checks drawn by plaintiff on these accounts were paid by the bank, and duly charged to the said accounts, respectively. On 1 August, 1925, and subsequent to said day, plaintiff made deposits with the said bank, which at his request were credited to the account of "C. M. Ingram, Back Tax Account." Checks drawn by plaintiff on this account were duly paid and charged to said account.

On 7 November, 1925, plaintiff withdrew from the Bank of Warsaw the entire balance to his credit on the two accounts, which were carried on the books of the bank prior to and on 17 February, 1925. On 21 April, 1926, the Bank of Warsaw was declared insolvent, and a receiver was thereafter duly appointed for said bank. On said day the balance to the credit of the account carried on the books of the bank, under the name of "C. M. Ingram, Sheriff, Back Tax Account," was $7,188.72. All deposits to the credit of said account were made by plaintiff after the date of the bond, upon which plaintiff seeks to recover in this action.

Upon the evidence tending to show the facts to be as above stated, there was error in the refusal of the court to allow defendants' motion, at the close of the evidence, for judgment dismissing the action as upon nonsuit.

By the express terms of the bond, if the Bank of Warsaw turned over to plaintiff certain funds deposited with the said bank, upon his demand, the bond became null and void, and defendants, sureties thereon, were discharged of liability. The bond cannot be construed as indemnifying plaintiff from loss on account of funds deposited with the bank after its date, certainly when said funds are credited, at his request, to another account. All the evidence shows that the bank has paid the funds on deposit with it, at the date of the bond, to plaintiff, upon his demand. The amount now due to the plaintiff by the bank was deposited after the execution of the bond, and is not included in the sum for which defendants are liable, as sureties on the bond.

Plaintiff alleges in his complaint "that it was the purpose and intent of said bond and of the parties thereto that the same should secure the plaintiff up to $30,000, against any loss of tax moneys which the plaintiff might on the date of said bonds or thereafter have on deposit in said Bank of Warsaw." This allegation is denied by defendants in their answers. The language of the bond does not support this allegation. Defendants' liability is restricted to the funds on deposit at the date of the bond; they cannot be held liable for funds thereafter deposited.

The principle stated in *Edgerton v. Taylor,* 184 N. C., 571, is applicable upon the facts of the instant case. It is said in the opinion in that case: "Sureties are favored by the law. Their obligations are ordinarily assumed without pecuniary compensation, and are not to be extended by implication or construction. They have a right, as we have said, to stand on the terms of their contract, and having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed, and it has been said to be insufficient that the surety may sustain no injury by a change in the contract, or that it may even be for his benefit."

This principle is applicable, notwithstanding the fact, shown by the evidence, that defendants at the time they signed the bond, were directors of the Bank of Warsaw. *Trust Co. v. Rose,* 192 N. C., 673. They were liable to plaintiff, not as directors of the bank, but as sureties on the bond. This liability having been discharged, plaintiff cannot recover of them in this action. The judgment in favor of plaintiff and against defendants, sureties on the bond, is

Reversed.

A. U. WILSON v. A. L. BRYAN, ADMINISTRATOR OF MERRILL BRYAN.

(Filed 28 March, 1928.)

1. **Injunction—Validity and Effect—Time Effective.**

   When an injunction has been issued against a foreclosure sale under the power contained in a mortgage of lands, but notice thereof not received until after the last and highest bid has been made, but before the consummation of the sale by payment and delivery of the deed, the sale is void, and the purchaser therein acquires no right thereunder.

2. **Injunction—Violation and Punishment — Action Before Notice Not Contempt.**

   Where a foreclosure sale of lands under a power of sale contained in a mortgage has been made and the mortgagee has not been notified before the bidding that an injunction had been issued by the court restraining the sale: *Held,* the sale is void from the time of the issuance of the restraining order, though the mortgagee would not be guilty of contempt in disobeying it until after notice of its issuance.

3. **Mortgages—Rights and Liabilities of Parties—Of Purchaser Under Foreclosure.**

   The last and highest bidder at a sale of lands under foreclosure of a mortgage is not an innocent purchaser for value when the court has previously issued an injunction against the sale.

APPEAL by plaintiff from *Nunn, J.,* at January Term, 1928, of CRAVEN. Affirmed.

Action to compel defendant to execute and deliver to plaintiff, the last and highest bidder at a sale made by defendant, under the power of sale contained in a mortgage, a deed conveying to him the land described in said mortgage, and also to restrain defendant from again selling said land under said power of sale.

From judgment upon the facts found by the judge, dissolving the temporary restraining order, and dismissing the action, plaintiff appealed to the Supreme Court.

W. B. Rouse and Ernest M. Green for plaintiff.
T. D. Warren and H. P. Whitehurst for defendant.

CONNOR, J. At 12 o'clock m. on 15 March, 1927, defendant, A. L. Bryan, administrator of Merrill Bryan, after having fully complied with the terms of a power of sale, contained in a mortgage executed by E. W. Bryan to his intestate, Merrill Bryan, offered the land described in said mortgage, for sale to the highest bidder, at the courthouse door in Craven County. Plaintiff was present at said sale, and was the last and highest bidder for said land, in the sum of $1,250. Immediately after plaintiff had been declared the last and highest bidder, and before any further proceedings had been had with respect to said sale, defendant was informed by telegram that at 11:50 a.m., on the same day, a temporary restraining order had been signed by a judge of the Superior Court at Beaufort, N. C., by which defendant was restrained and enjoined from selling or conveying the land described in said mortgage pursuant to his advertisement. The telegram was exhibited to defendant at 12:20 p.m. The restraining order was issued in an action, begun on 15 March, 1927, against defendant herein by E. H. and J. A. Meadows Company and others, as plaintiffs. Defendant immediately notified plaintiff that he would proceed no further with the sale; the restraining order was subsequently, on the same day, duly served on defendant. It was thereafter continued to the hearing. In the meantime plaintiff took no steps to assert his rights, if any, as the last and highest bidder at the sale on 15 March, 1927. Plaintiff herein was not a party to the action in which the restraining order was issued, but had notice of its issuance against the defendant therein who is also the defendant in this action.

The action entitled "E. H. and J. A. Meadows Company *et al. v.* A. L. Bryan, Administrator," came on for trial and was tried at October Term, 1927, of the Superior Court of Craven County. Judgment was rendered therein, on the verdict, dissolving the injunction, and authorizing the defendant, A. L. Bryan, Administrator, to proceed forthwith to sell the land described in the mortgage, under the power of sale contained therein. This judgment, upon plaintiff's appeal to this Court, has been affirmed. See opinion in *Meadows v. Bryan, post,* 398.

Thereafter, on or about 1 December, 1927, plaintiff tendered to defendant the amount of his bid made at the sale on 15 March, 1927, and demanded that defendant execute and deliver to him a deed conveying the land described in the mortgage to plaintiff. Defendant declined to accept the amount tendered by plaintiff and refused to comply with his demand for a deed.

Defendant thereafter advertised the land described in the mortgage for sale on 30 December, 1927. Plaintiff instituted this action on 29 December, 1927, and procured the issuance of a temporary restraining order enjoining defendant from making the sale as advertised on 30 December, 1927.

Upon the foregoing facts, the court was of the opinion that the sale attempted to be made by defendant on 15 March, 1927, at which the plaintiff herein was the last and highest bidder, was void, and of no effect, and that plaintiff acquired no right thereby either to a deed for the land or to an order in this action, restraining the defendant from selling said land under the power of sale, contained in the mortgage to Merrill Bryan, his intestate. In accordance with this opinion, judgment was rendered, dissolving a temporary restraining order issued therein and dismissing the action. Plaintiff excepted to the judgment, and upon his appeal to this Court assigns same as error.

The restraining order issued by the judge at Beaufort, N. C., in the action entitled, "Meadows & Company *et al. v.* Bryan," became effective from and after the moment it was issued. Although the defendant Bryan was not liable to attachment for contempt, for a violation of said order, until he had received notice, by service of the writ or otherwise, of its issuance, any act done by him after the order was issued in violation of its terms was void. Having been restrained and enjoined from selling said land, by the order issued at 11:50 a.m., the sale made by him at 12 o'clock was void. He was deprived of all authority to make the sale by the order, and for that reason could not have compelled the bidder to take and pay for the land, in accordance with his bid. The fact that he was not liable to attachment for contempt, for making the sale, because he was without notice, at the time, of the issuance of the order, is not determinative of the question here presented as to the validity of the sale. If defendant, after receiving the telegram at 12:20 p.m., advising him of the issuance of the order by the judge at 11:50 a.m., had proceeded with the sale, by executing a deed to the bidder, and receiving from him the amount of his bid, as the purchase price of the land, he would have been in contempt, and would have been liable to attachment therefor. It is well settled that a defendant who violates an injunction or restraining order before the writ has been served on him, is guilty of contempt, if at the time of such violation he has notice of the issuance of the order. *Mocksville Lodge v. Bibbs,* 159 N. C., 66, 74 S. E., 743; *Davis v. Champion Fibre Co.,* 150 N. C., 84, 63 S. E., 178; *Fleming v. Patterson,* 99 N. C., 404; *Edney v. King,* 39 N. C., 465. In 32 C. J., page 372, in section 627, it is said: "To make a temporary injunction effectual, it is generally necessary to serve a copy of the writ or restraining order on the parties enjoined; but has been held that if the defendant is otherwise informed of the issuance of the injunction, he will be bound thereby as if it had been actually served, and may be punished for the breach of it."

In order that a party to an action, upon whose motion a temporary restraining order has been issued therein, may be fully protected thereby, it is generally held that such order relates back to the date of the decision in accordance with which the order was made, and that such order continues in full force until dissolved or modified, or until final judgment is entered. 32 C. J., 373.

In the instant case, the sale made by the defendant, at which plaintiff was the last and highest bidder, was void for that it was made after the issuance of the restraining order, and while same was in full force and effect. At the time plaintiff and defendant received notice of the issuance of said order, the sale had not been completed by payment of the purchase money and execution of the deed conveying the land to the plaintiff. Plaintiff is not therefore in the position of an innocent purchaser for value. He was merely the last and highest bidder at a sale made without authority of defendant. Upon the facts found by the judge, and set out in the judgment, there is no error in the judgment dissolving the restraining order and dismissing the action. The judgment is

Affirmed.

W. A. BENTON v. MONTGOMERY LUMBER COMPANY.

(Filed 28 March, 1928.)

1. **Deeds and Conveyances—Trial—Questions of Law and Questions of Fact—Boundaries.**

   The question of sufficiency of boundaries given in a deed to lands is one of law, and the disputed location of the lands within these boundaries is one of fact for the jury upon the evidence, and presents a mixed question of law and fact upon the issue.

2. **Deeds and Conveyances—Trial—Directed Verdict.**

   Where in an action of trespass upon lands the description of the boundaries in a deed is sufficient in law, and the evidence tends only to show that the *locus in quo* was necessarily included to make the boundaries designated in the deed, an instruction is not error that directs a verdict thereon.

3. **Deeds and Conveyances—Construction and Operation—General Rules of Construction.**

   The object to be obtained in the interpretation of a deed is to effectuate the intent of the parties from the interpretation of the instrument as a whole, giving effect, if possible, to all of its parts; and where its terms are contradictory the first expressed will control; and language of doubtful meaning will be construed in the light favorable to the grantee; and a known and controlling call will prevail over descriptive specifications; and a prior perfect description that identifies the property will prevail over a later one.

APPEAL by plaintiff from *Sinclair, J.*, at November Term, 1927, of FRANKLIN. No error.

On 4 July, 1904, the plaintiff sold to the Greenleaf Johnson Lumber Company the timber on several tracts of land, and thereafter the defendant acquired the rights of this company. Among these tracts is one containing 30 acres. The plaintiff brought suit to enjoin the defendant from cutting and removing the timber from this tract on the ground that it was not conveyed by the plaintiff's deed to the Greenleaf Johnson Lumber Company. The description is as follows: "First tract, bounded on the east by the Anderson's Bridge Road, on the south by the John Ellis Old Place, on the west by Tar River, and on the north by the lands of Calvin Benton. Second tract, bounded on the south by the lands of Calvin Benton, on the west by Tar River, on the north by W. J. Ross and J. S. Ross, and on the east by the lands of B. H. Headen, which said tracts are composed of the Perry tract, the deed for which is recorded in Book 79, page 439, Franklin Registry; that part of the Coppedge tract which is conveyed by deed recorded in Book 146, page 49, Franklin Registry, the Upchurch tract conveyed by deed of J. R. Wheless and wife, recorded in Book 149, page 162, Franklin Registry; that part of the Upchurch tract conveyed by deed of J. H. Uzzell and wife and S. S. Strickland and wife, recorded in Book 75, page 182, Franklin Registry, all of which descriptions are hereby adopted and made a part of this conveyance. A tract of land containing about 23 acres, bought of A. C. Benton, is within the boundaries above set forth, but said tract is not included in this conveyance, being expressly reserved hereby."

This issue was submitted: "Was the timber on the thirty-acre tract of land described in the complaint included in the deed from W. A. Benton to Greenleaf Johnson Lumber Company?" The jury were instructed to answer the issue "Yes" if they found the facts to be as testified to by all the witnesses and shown by the record evidence. It was answered in the affirmative and judgment was given for the defendant. The plaintiff excepted and appealed.

Ben T. Holden and Edward F. Griffin for plaintiff.
Thomas W. Ruffin and Yarborough & Yarborough for defendant.

ADAMS, J. The appellant's exceptions to the exclusion of evidence must be overruled for the reason that the questions were framed so as to call for answers which would necessarily have embodied a mixed finding of law and fact. Whether the thirty-acre tract or any other was specifically described in the deed was not exclusively a question of fact which the surveyor could determine. What the boundaries are is a matter of law; where they are is a question of fact. *Lumber Co. v. Bernhardt,* 162 N. C., 460.

The exception chiefly relied on is that which was taken to the charge given the jury; but the significance of this instruction may readily be seen by reference to the evidence and the plat. The question on which the controversy turned was whether the thirty-acre tract is a part of the land "bounded on the south by the lands of Calvin Benton, on the west by Tar River, on the north by W. J. Ross and J. S. Ross, and on the east by the lands of B. H. Headen?" It is not denied that these boundaries include a part of the Coppedge land and the surveyor testified that they would not touch the lands of W. J. Ross unless they embraced the thirty acres in dispute. His Honor held as legal inference that the land of W. J. Ross was a part of the northern boundary; and if the jury accepted the undisputed evidence it necessarily followed that the thirty-acre tract was included in the description.

True, this is not one of the tracts particularly set out in the latter part of the description, but this fact does not necessarily impair the force of the defendant's contention. The proposition does not call for elaborate discussion. In the construction of deeds these principles seem to be settled: (1) The entire deed must be considered and such construction of particular clauses must be adopted as will effectuate the intention of the parties; (2) such construction will be adopted as, if possible, will give effect to every part; (3) if terms are contradictory the first in order will be given effect to the exclusion of the last; (4) when language is of doubtful meaning it will be given such construction as is most favorable to the grantee; (5) descriptive specifications cannot prevail over a known and controlling call; (6) a further description will not defeat a preceding perfect description which identifies the property conveyed. *Mayo v. Blount,* 23 N. C., 283; *Outlaw v. Gray,* 163 N. C., 325; *R. R. v. Carpenter,* 165 N. C., 465; *Lumber Co. v. Lumber Co.,* 169 N. C., 80, 94; *Miller v. Johnston,* 173 N. C., 62. Considered in the light of these principles the trial in our opinion was free from error.

No error.

MADELINE FURLOUGH, ADMINISTRATRIX, v. NASH COUNTY HIGHWAY COMMISSION ET AL.

(Filed 28 March, 1928.)

1. Evidence—Weight and Sufficiency—Evidence Held Sufficient on Issue of Negligence to Uphold Verdict.

Evidence tending to show that the defendant contractor for the building of a county highway suddenly turned the course of the old road at right angles at a railroad cut, leaving it without guard or signal to warn against danger, and that the plaintiff's intestate, traveling in an automobile at night ran off the edge of the cut and was killed is sufficient evidence of defendant's negligence to uphold the verdict in plaintiff's favor. *Evans v. Construction Co.*, 194 N. C., 31.

2. **Appeal and Error—Review—Error Waived in Supreme Court.**

An appeal from a judgment of nonsuit will be dismissed when the appellant has assigned no error or filed no brief.

APPEAL by defendant, Nello L. Teer, from *Sinclair, J.*, at August Term, 1927, of FRANKLIN.

Civil action to recover damages for an alleged wrongful death caused by defendants' alleged negligence in failing properly to guard a dangerous embankment, fill or cut, while the road along said embankment, fill or cut, was being reconstructed under the immediate direction and supervision of the defendant, Nello L. Teer.

This suit was originally brought against the Nash County Highway Commission, the Atlantic Coast Line Railroad Company and others, but prior to verdict nonsuits were entered as to all of the defendants except the defendant, Nello L. Teer.

It was in evidence that plaintiff's intestate was injured at a point outside the town of Nashville, where the road, which the defendant Teer was reconstructing under a contract with the Nash County Highway Commission, approaches a deep cut or railroad fill, and makes a right-angle-turn, within a few feet of the edge of said cut, and goes thence along the right of way of the railroad for a distance of about 150 feet, and then crosses the railroad tracks. The road where it runs up to the railroad cut had formerly been at a different point, and there was a ridge on the edge of the cut approximately 3½ or 4 feet high and about 4 feet wide. This ridge served as a shield and protected travelers against running into the cut, down the embankment and upon the railroad tracks. The ridge was cut down by the defendant while in charge of the construction work in such a way as to conceal the cut from the view of a traveler at night-time and to give the appearance of a hard-surfaced road leading straight ahead into the town of Nashville. On the night of 11 September, 1926, plaintiff's intestate, while driving in his automobile along said road, ran into said fill or cut, left in this alleged negligent condition by the defendant Teer, and received injuries from which he died the next day.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff's intestate injured and killed through the negligence of the defendant, Nello L. Teer, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff's intestate contribute to his injury and death by his own negligence, as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover of the defendant, Nello L. Teer? Answer: $12,000."

Judgment on the verdict for plaintiff, from which the defendant, Nello L. Teer, appeals, assigning errors.

Cooley & Bone, Ben T. Holden, E. T. Griffin and Biggs & Broughton for plaintiff.

E. H. Malone, Leon T. Vaughn, R. N. Simms, Pou & Pou and J. L. Emanuel for defendant, Nello L. Teer.

STACY, C. J. The tort liability of the defendant, Nello L. Teer, in failing properly to protect and direct traffic on the road in question, while under construction by him, is fully established by the decisions in *Evans v. Construction Co.*, 194 N. C., 31, and *Hughes v. Lassiter,* 193 N. C., 651, 137 S. E., 806, and it would only be a matter of repetition to state again what has been so recently said in these cases.

The record is large and the case an important one to the parties, but we have found no exception of sufficient moment to warrant an extended discussion. The controversy on trial narrowed itself principally to issues of fact, determinable alone by the jury under the evidence. A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable, and that the verdict and judgment ought not to be disturbed.

The plaintiff and defendant, Nello L. Teer, each noted an appeal from the judgment of nonsuit in favor of the Atlantic Coast Line Railroad Company, but as the plaintiff has failed to prosecute her appeal from this judgment, and the defendant, Nello L. Teer, has filed no brief and assigned no error in regard to same, the motion of the defendant, Atlantic Coast Line, to dismiss said appeals must be allowed.

No error.

W. I. HALL v. COMMISSIONERS OF DUPLIN.

(Filed 28 March, 1928.)

Taxation—Constitutional Requirements and Restrictions—Right of Counties to Issue Bonds Without Approval of Voters—Requisites Therefor.

In order to a valid issue of bonds by a county, under the County Finance Act of 1927, to purchase schoolhouses to comply with the mandate of our Constitution for a six months term of public schools, as a necessary county expense, without submitting the question to the vote of the people of the county, it is required that the resolution passed by the board of county commissioners so declare the fact to be, and the courts are without authority to supply the deficiency in the order. Const., Art. VII, sec. 7; Art. IX, sec. 3.

CIVIL ACTION, before *Harris, J.*, at January Term, 1928, of DUPLIN.

Oscar B. Turner, H. E. Faison and Manning & Manning for plaintiff.
Gavin & Boney and L. A. Beasley for defendant.

BROGDEN, J. This cause was considered by the Court upon a former appeal and is reported in 194 N. C., 768. The Court remanded the case to the Superior Court of Duplin County "for further proceedings" for the reason that the essential facts necessary to support the validity of the bonds did not appear either in the judgment or upon the record presented to the Court. Thereafter, on 10 January, 1928, an affidavit was filed by the members of the board of education and the county superintendent to the effect that on 9 May, 1927, the board of education requested the board of commissioners of Duplin County to issue bonds for the purpose of erection or purchase of schoolhouses in the maximum aggregate principal amount of $140,000, said bonds to be issued by said Duplin County as an administrative agent of the State of North Carolina pursuant to and under the authority of chapter 81 of Public Laws of 1927, known as the County Finance Act, the said erection and purchase of schoolhouses in Duplin County being necessary to provide a six months term in said county under the public school law and Constitution of North Carolina. The affidavit of A. T. Allen, State Superintendent of Public Instruction, was also filed, certifying that said school buildings are required "for the establishment or maintenance of the State system of public schools in accordance with the provisions of the Constitution." Thereupon a judgment was entered in part as follows: "The court doth find from the pleadings and affidavit filed the following facts: That on 9 May, 1927, the board of education of Duplin County requested the board of commissioners of Duplin County, the defendants in the above-entitled action, to issue bonds of Duplin County in the maximum aggregate principal amount of $140,000 for the erection or purchase of schoolhouses in said county, said bonds to be issued by Duplin County as an administrative agent of the State of North Carolina, and pursuant to and under the authority of chapter 81, Public Laws 1927, known as the County Finance Act. . . . That the erection or purchase of said schoolhouses, as above proposed, is necessary to provide a six months school term in Duplin County as provided by the Public Laws and Constitution of the State and in compliance with said law and the Constitution. It is thereupon considered and adjudged . . . that the said bond order passed by the board of commissioners of Duplin County on 18 July, 1927, . . . providing for the issuing of the sum of $140,000 bonds for the purpose of erection of schoolhouses be, and the same is hereby declared legal and valid in all respects."

From the foregoing judgment plaintiffs appealed.

The plaintiffs contend that the court had no power to find as a fact that the issue of said bonds was necessary for the purpose "of erection or purchase of schoolhouses required for the establishment or maintenance of a six months school term in accordance with the provisions of the Constitution." This contention is based upon the theory that the bond resolution passed by the board of county commissioners did not declare such purpose, and if the court be permitted to find such fact, when the bond resolution is silent with respect thereto, such action will in effect permit the court to pass a bond ordinance or to amend one already passed by the commissioners.

The bond ordinance passed by the board of county commissioners is set out in the record. Section 1, thereof, is as follows: "That the bonds of Duplin County shall be issued for the purpose of the erection or purchase of schoolhouses in the maximum aggregate principal amount of $140,000." The resolution contains no statement that such schoolhouses are required for the establishment or maintenance of a State system of public schools in accordance with the provisions of the Constitution. The resolution therefore is not sufficient to support the findings of the trial judge or warrant the judgment. Section 9, chapter 81, Public Laws of 1927, provides that bonds of a county shall be authorized by an order of the governing body, which order shall state (subsection a) "in brief and general terms, the purpose for which the bonds are to be issued, etc." The decisions of this Court are to the effect that bonds and notes may be issued for erecting and equipping schoolhouses and purchasing lands necessary for school purposes without submitting the question to popular vote "where such schoolhouses are required for the establishment or maintenance of the State system of public schools in accordance with the provisions of the Constitution." The power is not given the county to issue bonds for the erection and purchase of schoolhouses without a popular vote except where such schoolhouses and necessary land therefor are required for the establishment and maintenance of a six months school term as provided by the Constitution. *Lovelace v. Pratt,* 187 N. C., 686; *Frazier v. Commissioners,* 194 N. C., 49; *Owens v. Wake County, ante,* 132. The purpose for which the bonds are issued must be stated and set forth in the bond resolution itself. Hence we feel compelled to remand this case. If the only bond resolution duly passed by the county commissioners is the one appearing in the record in this case, then the county commissioners must adopt a resolution setting forth therein in accordance with the decisions of this Court, the purpose of said bonds in order that it may appear from the resolution itself that the bonds are issued for the purpose of the erection and purchase of schoolhouses, which are necessary for the establishment and maintenance of a State system of public schools in accordance with the provision of the Constitution.

Remanded.

PAUL D. McNEILL, ADMINISTRATOR, v. J. K. McGIRT ET AL.

(Filed 28 March, 1928.)

Trial—Submission and Withdrawal of Issues—Appeal and Error—Prejudicial Error—Bills and Notes—Endorsers.

When the endorsers on a note plead two separate and distinct defenses to their liability to the action, with evidence to support them, and the trial judge has submitted issues upon each of them, one upon want of notice of presentment and dishonor to them as accommodation endorsers, it is reversible error for the trial judge to withdraw this issue upon which the defense largely depends, from the jury and leave the jury uninstructed as to the law thereon, and submit the case upon the other issue alone.

APPEAL by defendants, Edna P. Sellers, Executrix, Eula McGirt, Executrix, and W. G. McLean, from *Bond, J.,* at October Term, 1927, of ROBESON.

Civil action to recover the value of certain Liberty Bonds, ten thousand dollars in amount, loaned to the Bank of Maxton a few months prior to its failure on 6 October, 1924.

Two causes of action are set out in the complaint: First, it is alleged that the bonds in question were procured from plaintiff's intestate upon the representation by the cashier of the Bank of Maxton that all the directors of said bank would guarantee their return or else see that he was paid their full value in money, and as collateral to this promise, a note for ten thousand dollars was executed to plaintiff's intestate by the Bank of Maxton and endorsed by some, but not all, of the directors of said bank.

In the second cause of action plaintiff declared upon the note which was executed 16 July, 1924, and has never been paid.

J. B. Sellers, who appears as one of the endorsers on said note, died before the institution of this action, and J. K. McGirt, who appears as another endorser thereon, died pending the litigation. Both are duly represented herein by their personal representatives who, with W. G. McLean, have filed answer denying liability, because, they allege that the note alone represents the agreement of the parties, and as they have had no notice of dishonor, as accommodation endorsers, they claim to be discharged from liability thereon. All of the defendants, except those answering, submitted to judgment by default final. It is admitted, however, that the defendants, other than those answering and appealing, are insolvent.

Issues were framed to cover both causes of action as well as the defense interposed by the defendants, but after the case had been submitted to the jury, the court recalled the jury and withdrew from their consideration all issues relative to the second cause of action. Defendants except.

From a verdict in favor of the plaintiff on the first cause of action, the defendants appeal assigning errors.

J. E. Carpenter and H. F. Seawell & Son for plaintiff.

J. G. McCormick, McKinnon & Fuller and McLean & Stacy for defendants.

STACY, C. J. The action of the trial court in withdrawing from the jury's consideration the issues originally submitted on the second cause of action, must be held for error under the circumstances here disclosed. It appears from an inspection of the record that the contention of the defendants was submitted principally, if not wholly, upon these issues. Hence the court, in withdrawing them without further instruction, inadvertently took from the jury, certainly for all practical purposes, the defendants' entire defense. This was error. *Gaskins v. Mitchell,* 194 N. C., 275, 139 S. E., 435.

The remaining exceptions are not considered, though it is observed that the decisions in *Busbee v. Creech,* 192 N. C., 499, 135 S. E., 326, and *Sykes v. Everett,* 167 N. C., 600, 83 S. E., 585, may become pertinent on another hearing. As to this, however, we express no opinion in advance of the evidence.

New trial.

BERTHA TURNER, ADMINISTRATRIX, ET AL. v. ALLEN TURNER ET AL.

(Filed 28 March, 1928.)

1. **Deeds and Conveyances — Construction and Operation — Estates and Interests Created.**

   A deed of land to a man and his wife by name, during the terms of their natural lives "and after the death of both of them, then to their children in fee simple," confines the takers under the limitation to the children of that marriage and excludes the children of the husband of a second marriage after the death of his first wife.

2. Deeds and Conveyances—Construction and Operation—General Rules of Construction.

The limitation over by deed may be construed, as in the present case, to effectuate the grantor's intent taken with regard to the circumstances surrounding him at the time of the conveyance, and the subject-matter thereof.

APPEAL by plaintiffs from *Devin, J.*, at February Term, 1928, of ROBESON.

Controversy without action submitted on an agreed statement of facts, which, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

On 13 October, 1902, a tract of land, the *locus in quo,* was duly conveyed "to Alfred Turner and wife, Minerva Turner, during the term of their natural lives and after the death of each and both of them then to their children in fee simple."

On said date Alfred Turner and wife, Minerva Turner, had seven children, defendants herein. No other child was born to this union.

After the death of Minerva Turner, Alfred Turner intermarried with Bertha Turner, and to this union three children were born, who, with their mother, are plaintiffs herein. Alfred Turner died intestate 8 April, 1927.

It is the contention of the plaintiffs, children of the second marriage, that they share with the defendants, children of the first marriage, as tenants in common, in the land acquired under the deed aforementioned and owned by Alfred Turner at the time of his death.

From a judgment in favor of defendants, the plaintiffs appeal, assigning errors.

George L. Grantham and Johnson, Johnson & Floyd for plaintiffs.
E. J. Britt and Varser, Lawrence, Proctor & McIntyre for defendants.

STACY, C. J. The parties to the present proceeding, having a question in difference which might properly become the subject of a civil action, have submitted the same for determination without action, upon an agreed statement of facts, as authorized by C. S., 626.

The question to be determined is whether the children of a second marriage share with the children of their father by a prior marriage, as tenants in common, in real property acquired during the first marriage under a deed conveying said property to the father and his then present wife, naming her, "during the term of their natural lives and after the death of each and both of them then to their children in fee simple."

The trial court was of the opinion, and so held, that, under the decision in *Williams v. Williams,* 175 N. C., 160, 95 S. E., 157, the children of the first marriage alone were entitled, as remaindermen, to the land acquired under this deed. In this we find no error.

The words "their children" may be used in an inclusive sense to designate the children of the husband and wife and the children of either, and in an exclusive sense to designate the children of the husband and his then present wife or of the wife and her then present husband. Neither law nor common usage has affixed such unvarying meaning to the word "their" as to prevent its appropriate use for either purpose. Hence, in determining the sense in which such words are used in a contract, will or deed, regard must be had to the circumstances, and the intent of the parties, as well as to the subject-matter. *Lehman v. Lehman,* 215 P. A., 344. In the instant case we think the words "their children" were used in an exclusive sense, meaning simply the children of Alfred Turner and his then present wife, Minerva Turner.

The principles announced in *Roberson v. Griffin,* 185 N. C., 38, 115 S. E., 824, are not applicable to the facts of the present record.

It follows from what is said above that the judgment of the Superior Court is correct.

Affirmed.

ACME MANUFACTURING COMPANY v. D. Y. KORNEGAY.

(Filed 28 March, 1928.)

1. **Appeal and Error — Record — Review of Questions Contradicted by Record.**

   The appellant may not insist in the Supreme Court that error had been committed by the trial court upon a state of facts contrary to the record.

2. **Pleading—Extension of Time for Filing—Power of Trial Court.**

   The authority of the Superior Court judge to set aside an order of the clerk upon the pleadings and grant extension of time to plead, etc., is not impaired by the statutory jurisdiction given the clerk.

APPEAL by plaintiff from *Devin, J.,* at December Term, 1927, of NEW HANOVER. Affirmed.

J. G. McCormick, Bryan & Campbell and C. D. Hogue for plaintiff.
W. H. Massey and K. O. Burgwin for defendant.

ADAMS, J. This is an appeal by the plaintiff from an order of the Superior Court setting aside a judgment by default final rendered by the clerk. In his complaint the plaintiff alleged that the defendant had executed and delivered to W. C. Massey his promissory note in the sum of $500, and had secured it by a lien or chattel mortgage on certain personal property; that the plaintiff had become a holder of the note in due course and that it was overdue; and, further, that the plaintiff was entitled to the possession of the mortgaged property. The defendant failed to file an answer within the time prescribed by law, and the clerk rendered judgment by default final. Thereafter the defendant made a motion before the clerk to set aside the judgment; the motion was denied and the defendant appealed to the Superior Court. At the hearing on appeal Judge Devin found the facts from the evidence and ordered that the clerk's judgment be set aside both for the excusable neglect of the defendant and for the irregular character of the judgment, and enlarged the time for filing the defendant's answer. The plaintiff excepted to and appealed from this order.

As we understand the record the theory upon which the appeal is prosecuted is not supported by the facts. Pursuant to Rule 27½ the appellant says in its brief that the only question involved is whether the defendant is not estopped by the order of the clerk "when there is no appeal therefrom." The appellant's argument was based upon this assumption: if the clerk's ruling was erroneous the defendant's only remedy was to appeal and have it reviewed. According to the record this is the remedy which the defendant invoked. The clerk's order contains an entry of the appeal and Judge Devin's order refers to the clerk's denial of the defendant's motion. The letters and the affidavits, except the affidavit of Edwards, which relates to transfer of the note, antedate the clerk's order, and there is nothing in the record to show that the judgment of the Superior Court was not awarded upon prosecution of the defendant's appeal. Upon the facts as presented the jurisdiction of the judge, in our opinion, is not to be questioned. C. S., 536, 637; *Caldwell v. Caldwell,* 189 N. C., 805; *Aldridge v. Ins. Co.,* 194 N. C., 683. The judgment is

Affirmed.

J. A. MATTHEWS v. SOUTHERN FIRE INSURANCE COMPANY.

(Filed 28 March, 1928.)

Insurance—Liability of Insurer—Evidence—Sufficiency.

Where the period covering the liability of an insurance company for theft of an automobile expires at noon of a certain day, the burden of proof is on the plaintiff in his action to show that the theft occurred before the date named, and evidence that raises a mere conjecture is not sufficient to resist defendant's motion as of nonsuit.

APPEAL by defendant from *Cranmer, J.,* at September Term, 1927, of SAMPSON. Reversed.

Action to recover upon policy of insurance issued by defendant to plaintiff, insuring plaintiff against loss by theft of his automobile.

The policy was issued on 20 October, 1924; it expired by its express terms at noon on 20 October, 1925.

Plaintiff's allegation that his automobile was stolen from his garage on the night of 19 October, 1925, was denied by defendant.

From judgment on the verdict, sustaining the allegations of the plaintiff, defendant appealed to the Supreme Court.

Roscoe Butler for plaintiff.
Faircloth & Fisher for defendant.

CONNOR, J. There was evidence at the trial in the Superior Court tending to show that plaintiff's automobile was stolen from the garage at his home, on State Highway No. 60, about seven miles from Clinton, the county-seat of Sampson County, during the month of October, 1925. Defendant, however, is not liable on its policy for the loss of the automobile, by theft, unless it was stolen prior to the expiration of its policy at noon, 20 October, 1925.

A careful scrutiny of the evidence set out in the case on appeal, in accordance with the rule applicable upon a motion for nonsuit, repeatedly stated and enforced by this Court, fails to disclose any evidence from which the jury could find that the automobile was stolen prior to noon, 20 October, 1925. There was evidence tending to show that plaintiff last saw his automobile on the night of 19 October, 1925, when he put it in his garage. He discovered its loss on the morning of 21 October, 1925. Whether it was stolen on the night of the 19th, during the day of the 20th, or on the night of the 20th of October, is left to conjecture. There was no evidence from which the jury could find the fact upon which plaintiff's right to recover in this action is founded, to wit, that the automobile was stolen after plaintiff had put it in his garage, and prior to noon, 20 October, 1925. *Dickerson v. R. R.,* 190 N. C., 292; *Whittington v. Iron Co.,* 179 N. C., 649; *Lewis v. Steamship Co.,* 132 N. C., 904.

Defendant's assignment of error, based upon its exception to the refusal of the court to dismiss the action as upon nonsuit, in accordance with its motion at the close of all the evidence, must be sustained. The judgment is

Reversed.

N. C. HINES v. ARTHUR LUCAS.

(Filed 28 March, 1928.)

1. Pleadings—Extension of Time for Filing—Power of Clerk.

When it appears that the clerk of the court has extended the time to file the complaint by orders regularly entered and in continuous and unbroken sequence for a period of about a year, and the defendant at the end of the full period so extended excepts and appeals to the Superior Court: *Held*, it is a valid exercise by the clerk of the power conferred by C. S., 505.

2. Same—Power of Trial Court.

Where the clerk of the court has extended the time for filing the complaint in accordance with 3 C. S., 505, and the defendant has appealed to the Superior Court, it is within the sound legal discretion of the trial judge, given by C. S., 536, to allow the complaint to be filed, and his sustaining the clerk's order to that effect is an exercise of this discretion.

CIVIL ACTION, before *Cranmer, J.*, at January-February Term, 1928, of WAKE.

The defendant made a motion before the judge presiding to dismiss the action in accordance with the provisions of 3 C. S., 505, for that the complaint had not been filed in accordance with the law. The court entered judgment overruling the motion and refusing to dismiss the action, from which judgment the defendant appealed.

Bailey & Weatherspoon and W. B. Jones for plaintiff.
Murray Allen for defendant.

BROGDEN, J. Summons was issued and personally served on the defendant on 22 January, 1926. The docket in the clerk's office shows that orders extending the time to file the complaint were regularly entered and in continuous and unbroken sequence until 15 January, 1927. The complaint was filed 3 January, 1927. On 21 January, 1927, the defendant moved to dismiss the action upon the ground that the orders for extension of time to file complaint were not made for good cause shown, and hence no complaint had been filed as contemplated by law. During the course of the argument of the motion, counsel for plaintiff admitted "that after a certain extension of time to file complaint had expired, an order or orders *nunc pro tunc* had been had extending the time for the reasons set out in the affidavit signed by plaintiff upon motion made and good cause shown being found by the clerk." 3 C. S., 505, provides: "The first pleading on the part of plaintiff is the complaint. It must be filed in the clerk's office on or before the return day of the summons, otherwise the suit may, on motion, be dismissed at the cost of plaintiffs; but the clerk, for good cause shown, may extend the time to a day certain." In *Perkins v. Sharp,* 191 N. C., 224, no complaint was filed until the lapse of two years, seven months and eight days from the issuance of summons. The defendant in that case contended that the clerk was without authority to allow the filing of the complaint after the lapse of so great a period of time. The Court held that the clerk, upon good cause shown, may make successive orders extending time to file complaint. Moreover, in the case at bar, the cause was regularly before the judge upon defendant's motion to dismiss. The judge had the power to extend the time for filing complaint and his refusal to dismiss the action, under the facts presented, was at least equivalent to an order permitting the filing of complaint. Under the law, as now written, when a cause is properly before the judge, he has power in the exercise of a sound legal discretion to extend the time for filing pleadings. C. S., 536; *Aldridge v. Ins. Co.,* 194 N. C., 683. While it is true that the *Aldridge case,* and the line of cases therein cited, refer more particularly to filing answer, no sound reason occurs to us why the same power does not exist for enlarging the time for filing complaint. C. S., 536. The defendant further contends that the words of 3 C. S., 505, "the suit on motion may be dismissed" should be interpreted to mean "must" be dismissed. In other words, "may" means "must." The words have been so construed with reference to venue in certain cases. *Jones v. Statesville,* 97 N. C., 86; *Brown v. Cogdell,* 136 N. C., 32. But the principle has never been extended so as to deprive the clerk or the judge of discretion in proper instances, to enlarge the time for filing pleadings.

Affirmed.

STATE v. MRS. J. F. HUNDLEY AND MISS LOUISA HOFFMAN.

(Filed 28 March, 1928.)

Municipal Corporations—Ordinances—Validity.

A city ordinance passed in pursuance of C. S., 2787(11), requiring a license to be issued by the municipal authorities to beg upon the city streets or to solicit contributions for charitable or religious purposes, in accordance with whether the person or purpose is ascertained by such authorities as worthy or whether the moneys solicited will be properly applied, is a valid and undiscriminating exercise of a police power, and not unlawful as an interference with the religious liberties of our people, or an obstruction to the lawful pursuit of their business.

STACY, C. J., and ADAMS, J., concurring.
CLARKSON and BROGDEN, J.J., dissenting.

APPEAL by defendants from *Webb, J.,* at July Term, 1927, of MECKLENBURG. No error.

Each of the defendants was tried in the recorder's court of the city of Charlotte, upon a warrant issued on 27 June, 1927, charging a violation of an ordinance of the city of Charlotte. From judgments upon convictions at said trials, each defendant appealed to the Superior Court of Mecklenburg County. At July Term, 1927, of said court the actions were by consent consolidated for trial. There was a verdict of "guilty" as to each defendant.

From judgment upon the verdicts defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

C. Henry Edwards and Fred McCall for defendants.

CONNOR, J. The question presented for decision by this appeal involves only the validity of an ordinance of the city of Charlotte, duly adopted and ratified on 16 December, 1926. By its terms the said ordinance became effective from and after 27 December, 1926. It is as follows:

"Section 1. It shall be unlawful for any person to engage in the business of soliciting alms, or begging charity, for his or her own livelihood, or for any charitable purpose, upon the streets of the city of Charlotte, or in any public place within the corporate limits of the city of Charlotte, without first securing a permit from the governing body of the city of Charlotte to engage in such business.

"Section 2. Any person desiring to engage in the business of begging, or soliciting alms, shall file with the governing body of the city of Charlotte an application for a permit, which permit shall state the name of the person who makes the application, the purpose for which alms or charity are to be solicited, and the manner in which said funds are to be disbursed, and the governing body of the city of Charlotte shall not issue a permit, as provided herein, to any person unless the said governing body shall be satisfied that the said applicant is a person worthy of assistance or help from the citizens of Charlotte, or that the cause said applicant represents is a worthy cause, and that the funds to be solicited will be properly disbursed.

"Section 3. That any person soliciting alms, or begging charity in violation of the provisions of this ordinance shall be guilty of a misdemeanor and liable to a fine of fifty dollars ($50), and each act done in violation hereof shall constitute a separate offense.

"Section 4. That all ordinances in conflict herewith are repealed.

"Section 5. That this ordinance shall be in full force and effect from and after the 27th day of December, 1926."

Each defendant admitted on the trial in the Superior Court that she had solicited alms on the public streets of the city of Charlotte on the days named in the affidavits upon which the warrants were issued, and that such solicitations were made by her in behalf of the American Rescue Workers, Inc., a corporation organized under the laws of the State of New York, and as such engaged in religious and charitable work in the city of Charlotte. No permit had been issued to either of the defendants or to the American Rescue Workers, Inc., by the governing body of the city of Charlotte to solicit alms on the streets of said city. Applications had been made by defendants and also by the American Rescue Workers, Inc., for such permits, pursuant to the provisions of the ordinance, but the governing body of said city had refused to issue such permits to said applicants. The defense at said trial was solely upon the ground that said ordinance is void. The defendants contended at the trial, as stated in their brief filed in this Court, "that they were guilty of no offense since, as they contend, the ordinance is unreasonable, unconstitutional and void for that it constitutes an attempt to use the police power in an arbitrary, unreasonable and oppressive manner by clothing the city commissioners with uncontrolled, unlimited, unregulated and arbitrary power to forbid and prohibit any person from soliciting for charity, regardless of his personal worth or fitness, at their ungoverned will or whimsical pleasure; and that it unwarrantedly interferes with the religious liberties of the American Rescue Workers, Inc., and obstructs them in the lawful pursuit of happiness."

At the close of the evidence, in accordance with its opinion that the ordinance is valid, the court instructed the jury that if they found from the evidence, beyond a reasonable doubt, the facts to be as contended by the State, they should return a verdict of guilty as to both defendants. Defendants excepted to this instruction and assigns same as error.

The city of Charlotte, as a municipal corporation, has the power, conferred upon it by the General Assembly, "to adopt such ordinances for the regulation and use of its streets, squares and parks and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city." C. S., 2787, subsection 11. The ordinance involved in this appeal was duly adopted by the city of Charlotte, in the exercise of the power thus conferred. It is therefore valid unless it is unreasonable and oppressive in its provisions or unless it confers upon its governing body power to discriminate arbitrarily as between persons who may apply for permit to do the things otherwise forbidden by the ordinance. An ordinance of a municipal corporation, although adopted in the exercise of power conferred by statute, may be held invalid, upon the ground that it is unreasonable. It must be impartial, fair and general. When, however, an ordinance is within the grant of power to the municipality, the presumption is that it is reasonable. By force of this presumption, it will be held valid, unless its unreasonable and oppressive character is apparent on its face, or unless by its terms it purports to confer power upon some public official to discriminate arbitrarily between citizens or other persons who may be affected by the provisions of the ordinance. Whether an ordinance is reasonable or unreasonable, or whether the power conferred by it may be exercised arbitrarily or not, is for the court to determine as a matter of law, from the terms of the ordinance itself. The court will not, ordinarily, inquire into the motives which prompted the adoption of the ordinance, nor, upon the trial of a criminal action for its violation, into the manner in which the ordinance has been enforced, with respect to persons other than the defendant in said action. The ordinance, when its validity is challenged upon the ground that it is unreasonable, or that it confers arbitrary power with respect to the enforcement of its provisions, must stand or fall as the same has been adopted by the municipality. As said by this Court in *S. v. Stowe,* 190 N. C., 79, "In the exercise of an unquestioned police power, much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with, unless they are manifestly unreasonable and oppressive." The following authorities are cited in support of this principle: Dillon's Mun. Corp., sec. 379; *McLean v. Kansas,* 211 N. S., 539; *Dobbins v. Los Angeles,* 195 N. S., 223; *S. v. Kirkpatrick,* 179 N. C., 747; *S. v. Shannonhouse,* 166 N. C., 241; *S. v. Lawing,* 164 N. C., 492; *S. v. Johnson,* 114 N. C., 846.

We concur with the learned judge who presided at the trial in the Superior Court, that the ordinance is valid. We find nothing therein unreasonable or oppressive; nor does the ordinance confer upon the governing body of the city of Charlotte arbitrary power to discriminate between applicants for permits to engage in the business of soliciting alms or begging charity, for a charitable purpose, upon the streets of the city of Charlotte. It is made the duty of said governing body to issue the permit to the applicant unless said governing body shall be satisfied (1) that the said applicant is not worthy of assistance or help from the citizens of Charlotte, or (2) that the cause said applicant represents is not a worthy cause, or (3) that the funds solicited will not be properly disbursed. Evidence offered at the trial, and set out in the case on appeal shows that, with respect to the applications of defendants in this action and of the American Rescue Workers, Inc., the said governing body made extended investigations, and that the applications were refused only after long and continued consideration. It is apparent, we think, that said governing body acted in good faith and after a careful exercise of the discretion vested in them by the ordinance in the matter of said applications.

The contention that the ordinance in question deprives the defendants and the American Rescue Workers, Inc., of their religious liberties, or that it obstructs them in the pursuit of happiness, manifestly, we think, cannot be sustained. It cannot be held as law that defendants or any other persons have a legal right to use the streets of a city for the purpose of carrying on the business of soliciting alms or begging for a charitable purpose, however, worthy, upon the ground that they are thus engaged in the exercise of their religious liberties; nor that the right of defendants to pursue their happiness is unlawfully obstructed by forbidding them to use the streets for this purpose, without a permit from the city, which gives assurance to all who may be charitably inclined that their contributions for a worthy cause will be properly disbursed. The purpose of the city of Charlotte in adopting the ordinance was, manifestly, the protection of persons who may be using its streets for the purpose for which they were constructed and are maintained, from solicitation for contributions for charitable purposes by persons who are unworthy, either because of lack of personal character, or because of lack of sufficient judgment to apply the contributions received by them wisely and properly. It would seem that the ordinance will encourage rather than discourage contributions from charitably disposed persons to worthy persons and for worthy causes. No sufficient grounds appear for holding as a matter of law that the ordinance is void. The ordinance is valid, and defendants having admitted that they had violated its provisions, as contended by the State, there is no error in the instruction of the court to the jury, which defendants assign as error. There are other assignments of error appearing in the record. They all, however, present defendants' contention that the ordinance is void. They cannot be sustained. The judgment is affirmed.

No error.

STACY, C. J., and ADAMS, J., concurring: We are of opinion that the ordinance in question is valid. It applies equally to all and to all alike. The validity of the action of the governing body in withholding permit from the present defendants is not before us for decision. The only question presented for determination is the validity of the ordinance. It vests in the governing body a sound legal discretion, which may not be exercised arbitrarily.

CLARKSON, J., dissenting: The power of the city over its streets is as follows: C. S., 2787, subsection 11: "To open new streets, change, widen, extend, and close any street that is now or may hereafter be opened, *and adopt such ordinances for the regulation and use of the* *streets,* squares and parks, and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city."

The following ordinance adopted by the governing body of the city of Charlotte was ratified 16 December, 1926:

"Section 1. It shall be unlawful for any person to engage in the business of soliciting alms, or begging charity, for his or her own livelihood, or for any charitable purpose, upon the streets of the city of Charlotte, or in any public place within the corporate limits of the city of Charlotte, without first securing a permit from the governing body of the city of Charlotte to engage in such business.

"Section 2. Any person desiring to engage in the business of begging, or soliciting alms, shall file with the governing body of the city of Charlotte an application for a permit, which permit shall state the name of the person who makes the application, the purposes for which alms or charity are to be solicited, and the manner in which said funds are to be disbursed, *and the governing body of the city of Charlotte shall not issue a permit, as provided herein, to any person unless the said governing body shall be satisfied that the said applicant is a person worthy of assistance or help from the citizens of Charlotte, or that the cause said applicant represents is a worthy cause, and that the funds to be solicited will be properly disbursed."*

It will be noted that the power given is *"regulation and use of the streets."*

The main opinion holds that under the police power the ordinance of the governing body of the municipality is valid, and will not judicially be interfered with unless *manifestly unreasonable and oppressive.* I do not think that the main opinion deals with the vice of the ordinance. The power given to the governing body is to pass ordinances *for the regulation and use of the streets.* An ordinance passed must so regulate the use of the streets that in its application all classes of its citizens will be treated alike. For example, a parking ordinance must be applicable to all its citizens alike, uniform in its application. The certain parking zones cannot be so juggled that the governing body can grant to one a right to park in a particular locality in its discretion and refuse others. Could the governing body of the city pass an ordinance in reference to the regulation and use of the streets allowing the newsboys to sell on the streets the morning paper and not the evening paper, or *vice versa?* Is the little fellow who sells the paper less annoying than the good women soliciting alms for sweet charity's sake? The governing body declaring one worthy and the other unworthy. I say no. *City of Hammond v. Farina Bus Line and Transportation Co.,* 48 Sup. Court Reporter, 70, decided 21 November, 1927. There can be no discrimination in the ordinance as written, it must operate equally upon all persons. "Equal rights to all, special privileges to none." The leading case—Gen., ch. 37, verses 3 and 4—When Jacob of old made Joseph "a coat of many colors" and loved him more than the other eleven of his sons "they hated him (Joseph) and could not speak peaceably unto him." The peace of the family was destroyed. Special privilege has always created hatred; therefore, to promote peace and equality, the law has always, as far as possible, laid down the broad rule of equal rights to all. No discrimination, "equal protection of the laws."

Recognizing these fundamental principles, the Const. of U. S., Art. XIV, part sec. 1, is as follows: "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The principle laid down by the United States Court is as follows: An objection that a state statute denies to a party the equal protection of the law can only be sustained if the statute treat the party differently from what it does others who are in the same situation as he; that is, in the same relation to the *purpose of the statute. Gulf, etc., R. Co. v. Ellis,* 165 U. S., 150; *Atchison, etc., R. Co. v. Matthews,* 174 U. S., 103; *Lloyd v. Dollison,* 194 U. S., 445; *Halter v. Nebraska,* 205 U. S., 34; *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S., 78; *International Harvester Co. v. Missouri,* 234 U. S., 199. Const. of the U. S. of Amer., revised and anno. (1924), p. 724.

"It is settled that in tax matters a license tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed." Quoted in *Express Co. v. Charlotte,* 186 N. C., at p. 675.

It is held in *Bizzell v. Goldsboro,* 192 N. C., at p. 358: "The ordinances are far-reaching, and the law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike."

"The principle is well settled that ordinances must be uniform, fair, and impartial in their operation. They must be reasonable and not arbitrary. There can be no discrimination against those of the same class. The regulation must apply to all of a class. An ordinance that grants rights—the enjoyment must be to all, upon the same terms and conditions. An ordinance cannot penalize one, and for the same act, done under similar circumstances, impose no penalty. No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike—then there can be no special privilege or favoritism. The right of individuals to engage in a lawful calling and use their property for lawful purposes is guaranteed to them," citing numerous cases. *Town of Clinton v. Standard Oil Co.,* 193 N. C., at p. 435; 137 S. E., 185.

McQuillin Municipal Corporations, 2 ed. (1928), sec. 775, lays down the principle thus: "Ordinances must be fair, impartial and uniform in their operation. Where privileges are granted by an ordinance, they should be open to the enjoyment of all upon the same terms and conditions. An ordinance cannot make a particular act penal when done by one person and impose no penalty for the same act done under like circumstances by another. . . . All discriminations in ordinances against those of the same class are bad. An ordinance must be general in its character and operate equally upon all persons within the municipality of the class to which it relates. No arbitrary distinction between different kinds and classes of business can be sustained, the conditions being otherwise similar."

In *S. v. Denson,* 189 N. C., at p. 175, *Adams, J.,* quotes as follows: " 'The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.' *Mr. Justice Field,* in *Soon Hing v. Crowley,* 113 U. S., 703; 28 Law Ed., 1145." citing numerous authorities.

In *Harden v. Raleigh,* 192 N. C., at p. 398, it is said: "In the present case a tribunal was established and charged with duties, not ministerial, but at least *quasi*-judicial and subject to review as the statute prescribed."

I can see no reason why the same salutary principles in reference to property rights should not extend to a business devoted solely to rescuing the perishing by *soliciting alms* or *begging charity* for any *charitable purpose.* The exceptional cases are where it is difficult or impracticable to lay down a definite comprehensive rule or the police power is necessary to protect the public morals, health, safety and general welfare. Here the object is to aid in all these.

Francis Bacon, in his Essay "Of Goodness and Goodness of Nature," says: "The desire of power in excess caused the angels to fall; the desire of knowledge in excess caused man to fall; *but in charity there is no excess,* neither can angel nor man come in danger by it."

The defendants belonged to an organization, known as "The American Rescue Workers, Inc.," is a Christian Church and has been in existence since 1882. Its objects, in part; "(1) The character of the business is religious, home mission and philanthropic work. (2) The dissemination of the Word of God to the masses not reached by ordinary church methods, and the amelioration of the lots of the widow and the fatherless, the cripples and all of God's children in need. The American Rescue Workers are supported by voluntary contributions of those enjoying God's blessings to a greater extent than those in need. . . . The American Rescue Workers is a nonsectarian organization that labors for the widowed mothers and fatherless children, preach the gospel, lift up the fallen and work for God and humanity." The American Rescue Workers are engaged in the work of administering to and taking care of the sick, the distressed, abandoned wife and children and, particularly, in furnishing a home and refuge for young girls who are about to be confined and have no place to go and no relatives or friends who can, or will, give aid. Regular books are kept by the Rescue Workers of America, which show all contributions received, and all expenditures for whatsoever purpose, together with the nature and character of every patient admitted to the home or administered to elsewhere. In addition to the charitable work done by the Rescue Workers of America, as above indicated, regular religious services are held and religious instruction, undenominational and nonsectarian, is given daily. The Rescue Workers of America have no income except such voluntary contributions as may be received. At the time the permit was refused, the organization had twelve girls in the home and three babies. Not a penny is charged for taking in destitute girls or doing any other charitable work. The Rescue Workers get only their necessities of life. The American Rescue Workers' home was acting, at the time of the refusal of the permit, under the supervision of M. M. Gray, the county welfare officer. Two or three of the girls were sent to the home by welfare officers.

The record discloses that E. E. Baker and W. B. Stuart each testified: "That I am familiar with the nature of the work of the American Rescue Workers in this city; that the persons here named are people of high character and integrity, and that the cause which they pursue and in which they are engaged is most worthy, and that the American Rescue Workers are filling a great need, not otherwise met, in a most praiseworthy manner."

M. M. Gray testified: "I am county superintendent of welfare for Mecklenburg County. I know the Hundleys and The American Rescue Workers of Charlotte. I know their reputation; it is good. I know the reputation of their home; it is good." Mr. Gray further made a statement, in part: "There is no question whatever as to the need for such an institution here. . . . There are numbers of girls who need the care of such an institution and do not get it, nor are sent to a hospital. . . . Just from the standpoint of money saved to Charlotte and Mecklenburg County, such an institution is needed here, disregarding the number of girls in the adjacent territory, for whom such a place would be a Godsend. . . . It is pathetic that so much of the time and energy of so-called social workers is taken up fighting each other, when it ought to be used entirely in prosecuting their work of helping their fellowmen. Of course the welfare department is not directly concerned with the Salvation Army; still they are our friends, and are a great help to our work. The attitude of the Salvation Army toward the American Rescue Workers is doing the Salvation Army no good. That is true locally, and no doubt in the State at large."

It is admitted that the American Rescue Workers is a charitable organization; they, the defendants, solicited alms and funds upon the public streets of the city of Charlotte for distribution among the poor, and it is admitted they have solicited in Charlotte without a permit or without a license.

The record discloses: The city commissioner of public safety testified in part: "I think they are doing a worthy work as far as it goes, but I don't think they are working under proper conditions or surroundings. . . . I sent Chief West down there to make investigation at one time, and he said he did not see anything wrong from a police point of view. In all the reports I have, there was nothing against the morals of the place and nothing against the reputation of the people living in the home."

J. H. Brown testified: "I live in Concord. I have been for four years superintendent of public welfare for Cabarrus County. I know something about the reputation of the American Rescue Workers Home; it is good. I have sent girls here to this home. I could not get them in at any other place, and have sent them over here."

Mrs. Hundley testified in part: "Those girls are under my personal supervision all the time. I consider the work I am doing, taking those people into our home, a part of the religious doctrine of our church. If we were unmolested and left alone, the contributions and freewill offerings from the public would be sufficient to take care of our charitable, religious and benevolent work."

On the entire record, these two women defendants—women of the highest character and reputation beyond dispute—were fulfilling the ideal: "He hath sent me to heal the broken-hearted, to preach deliverance to the captives and recovering of sight to the blind, to set at liberty them that are bruised." The entire record shows defendants are worthy.

It was suggested in the argument that from the facts appearing on the record mandamus would lie to compel a permit; that the record showed a "clear present legal right." I go further, and from the authorities cited, I think the ordinance is void.

A similar case to the one at bar is *Ex parte Dart* (Cal.), 155 Pac., 63, L. R. A., 1916, D 905. The Salvation Army, in Los Angeles, Cal., an organization founded on the ideals of the Christian religion and its main object charity, was doing there a commendable work. An ordinance in many respects like the present one was passed by the authorities of Los Angeles. Section 2 is as follows: "It shall be unlawful for any person, firm, corporation or association to solicit alms, food, clothing, money or contributions within the city of Los Angeles, *without first securing a permit so to do from the Municipal Charities Commission of said city.* Provided, however, that the provisions of this section shall not apply to properly accredited solicitors of established churches of said city soliciting for purely religious purposes, but it shall apply to the various institutional works carried on by said churches in like manner as other persons, firms, corporations and associations. The permit from the charities commission above referred to shall consist of a written certificate issued by the said commission certifying that the *object of said solicitation is worthy and meritorious* and authorizing the soliciting of gifts and donations therefor, said permits may be revoked by said commission at any time." Dart was arrested for violating the ordinance. The Court said, at p. 65: "Nay, more in the city of Los Angeles itself its needy childhood goes unfed and unclothed, its dependent womanhood unprotected and uncared for by organized charities except they have a 'permit.' Surely here, if anywhere, is

> 'The organized charity, scrimped and iced,
> In the name of a cautious, statistical Christ.' . . .

"(p. 66) The two religions exercising the most potent influence in shaping the material and spiritual destinies of the white-skinned races are the Jewish and the Christian. To these, as to all others, perfect freedom of exercise is constitutionally guaranteed. In both of these religions charity is the central word. It is enjoined, not as a good thing, or a wise thing, or as a kindly thing only, but as a fundamental part of the religion itself. . . . Does it need more, does it need so much, to show that in these religions the bestowal of charity, the devotion of life to charity, are a part of the religion itself? And does it demand discussion to establish so plain a truth as that touching religion there is a doubtful zone which legislation should be most reluctant to enter? The founders of the nation recognized it when they placed the great guaranty of religious liberty in the Constitution of a free people, and it is for every court to see that liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant. So when legislation does enter that uncertain domain, the fact that it is there must bring to it condemnation. In accordance with the dictates of the Constitution itself, the doubt will be resolved in favor of religious liberty. And it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself which owes so much to religion, even if the efficiency of religious charities be not up to the standard of perfection set by the Municipal Charities Commission. . . . (p. 67) Other methods of regulation may also be allowable; but a law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in nowise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any official body without other cause than its own will or desire, is beyond the legislative power, and to that extent void."

From the record the Salvation Army was issued a permit, the American Rescue Workers denied one. We must construe the ordinance in its entirety. It does indirectly what the law says cannot be done directly. The sequence is that the Salvation Army is the "sole-seller" of charity (the definition of monopoly in the *Clinton case, supra),* in the city of Charlotte. They are worthy to solicit alms on the streets of Charlotte, the American Rescue Workers, Inc., cannot. This discrimination is dangerous to a free people. I do not question the good works of the Salvation Army; I am questioning the right to grant to them a special privilege and deny the American Rescue Workers, Inc., a like privilege. The ordinance is far-reaching in its effect. The good women or men of the Jewish persuasion may desire for their race to solicit alms for charity. The good women and men of some Protestant or non-Protestant body may desire for their particular faith to solicit for charity. Other organizations charitably inclined may desire to solicit for charity. The ordinance gives the power to the governing body in their discretion to kill or make alive. Such favoritism cannot be justified in law. The ordinance should be applicable to all alike, else it is void. Equal protection of the law implies the protection of equal laws.

The Associated Charities, the Salvation Army, the American Rescue Workers, and every other agency for good should be encouraged and allowed to pursue their high ideals of reclaiming the human wreckage. Charity should not be canned. "Main Street" requirements should not hamper the poor. There should be uniform regulations, and all similarly situated have "the equal protection of the laws" guaranteed by the Constitution.

I am authorized to say that MR. JUSTICE BROGDEN concurs in this dissent.

J. C. VAN KEMPEN, RECEIVER OF ESTATE OF H. A. BLIJDENSTEIN, v. J. E. LATHAM, TRUSTEE OF E. B. HACKBURN AND J. E. LATHAM, EXECUTOR OF THE ESTATE OF E. B. HACKBURN, DECEASED.

(Filed 28 March, 1928.)

1. Pleadings—Demurrer—Effect Thereof.

A demurrer to the complaint admits every material fact properly alleged, and all inferences and intendments as may be fairly and reasonably drawn therefrom by liberal construction, so that actions may be tried on their merits in furtherance of our Code system.

2. State—Relationship to United States—Force of Federal Judgments Under "Full Faith and Credit" Clause.

While not specifically so stated in the Constitution of the United States, Art. IV, sec. 1, judgments of the Federal Courts are to be given the same faith and credit in our State as those rendered in other States, and they are conclusive of all matters involved in the adjudication except when vitiated by fraud, or when the parties to be concluded are not properly before the court.

3. Receivers—Foreign Receivers—Right to Maintain Action in Our Courts.

A receiver appointed by a foreign nation for the estate of a friendly alien may be permitted by our courts to sue herein under the spirit of comity, when there is nothing involved in the action that may be construed as against our public policy or the rights of our citizens.

4. Same—Receiver's Certificate.

In order for the foreign receiver of the estate of a friendly alien to maintain his action in the courts of our State under the spirit of our comity laws, if traversed, he must establish the fact of his receivership by a duly certified transcript to that effect from the court of his appointment.

5. Same.

The receiver appointed in a foreign jurisdiction has no extra territorial right to maintain an action in the courts of this State.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1927, of CRAVEN. Reversed.

The material facts: Civil action brought by plaintiff against defendant for the recovery of $30,000 and interest, evidenced by two notes dated 5 August, 1919, one for $5,000, due and payable 5 August, 1921, and the other for $25,000, due and payable 5 August, 1922, made and executed by E. W. Rosenthal and E. B. Hackburn, jointly and severally, payable to Francis P. Garvin, as Alien Property Custodian, Trust No. 23567. The endorsements on the notes were as follows: "Pay to the order of the American Express Company, as attorney in fact for J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein—Alien Property Custodian, by Whitney Central National Bank, depository Trust No. 23567. N. E. Berthal, Asst. Cashier.—American Express Co."

A final decree in the Supreme Court of the District of Columbia, entitled "J. C. Van Kempen, Receiver of the Estate of H. H. Blijdenstein, Plaintiff, v. Thomas W. Miller, as Alien Property Custodian, Guy F. Allen, as Treasurer of the U. S., and J. J. Blijdenstein, Defendants," was filed 19 April, 1921. In reference to the notes in the present controversy, and other property, the final decree in part was as follows: "It is therefore adjudged, ordered and decreed that Thomas W. Miller, as Alien Property Custodian, do forthwith convey, transfer, assign, deliver and/or pay to J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein, the money and other property heretofore specified as held by him as Alien Property Custodian." It is alleged that the said notes and interest are now due and owing plaintiff, in due course and by virtue of the decree he became the owner and holder of the notes. The final decree set forth in the complaint was exemplified in accordance with the act of Congress in reference to authentication of judicial proceedings.

J. E. Latham was made, by a certain instrument duly recorded, trustee of the property of E. B. Hackburn, and managed and controlled same during his lifetime, and was made executor of his will; that he still holds the property as trustee; that the defendant, J. E. Latham, is the duly qualified and acting executor of his estate.

It is further alleged in the complaint: "That on 15 June, 1921, in the District of Arrondissement Court of Justice at Amsterdam, Kingdom of Netherlands, by due order under thereat, the said J. C. Van Kempen, as the receiver of the estate of H. H. Blijdenstein, was duly authorized and directed to bring this suit."

An order on 13 October, 1926, was made by N. A. Sinclair, judge of the Superior Court, which, in part, is as follows: "It appearing to the court that a cause of action exists in favor of J. C. Van Kempen, receiver of estate of H. H. Blijdenstein against J. E. Latham, trustee of E. B. Hackburn, and J. E. Latham, executor of the estate of E. B. Hackburn, deceased: It is therefore ordered, considered and decreed that the said J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein be and he is hereby allowed and permitted to institute a civil action in the Superior Court of Craven County, North Carolina, against the said J. E. Latham, trustee of E. B. Hackburn and J. E. Latham, executor of the estate of E. B. Hackburn, deceased, and to further sue in said action such parties as may be necessary to a determination of said action."

The defendant demurred to the complaint. The court below sustained the demurrer and the plaintiff excepted, assigned error and appealed to this Court.

Frank C. Lee, George T. Willis and Abernathy & Abernathy for plaintiff.

Moore & Dunn for defendant.

CLARKSON, J. It is a general rule that a demurrer is an admission of the truth of every material fact properly averred in the complaint. It admits such facts are properly pleaded and all inference and intendment that may fairly and reasonably be drawn therefrom. The Code system of pleading, which prevails with us, is to have actions tried upon their merits, and to that end pleadings are construed liberally.

From the allegations of the complaint and the reasonable inferences we have: (1) The execution of the two notes now due and owing, aggregating $30,000 and interest, made by E. W. Rosenthal and E. B. Hackburn, jointly and severally; (2) J. E. Latham, as trustee managed and controlled the property of E. B. Hackburn during his lifetime and is still doing so. He died leaving a will, and J. E. Latham is the duly qualified and acting executor of the estate; (3) the transfer of title by the decree of the Supreme Court of the District of Columbia to plaintiff; (4) an order of the judge of the Superior Court authorizing the plaintiff to bring the present action; (5) an order from the court in which plaintiff was receiver authorizing and directing him to institute this action.

In *Webb v. Friedberg,* 189 N. C., at p. 171-2, it is said: "Article IV, sec. 1, Const. of U. S., is as follows: 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.' *Hanley v. Donoghue,* 116 U. S., 1; *Thompson v. Whitman,* 18 Wall., 457; *Andrews v. Andrews,* 188 U. S., 14; *Haddock v. Haddock,* 201 U. S., 562; Const. of U. S., Anno., 1923, p. 478, *et seq.* 'By virtue of Const. U. S., and acts of Congress in pursuance thereof, judgment of other states are put upon the same footing as domestic judgments; they are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the court.' *Marsh v. R. R.,* 151 N. C., 160; *Miller v. Leach,* 95 N. C., 229."

In *Knights of Pythias v. Meyer,* 265 U. S., p. 30, at p. 33, it is said: "While the judicial proceedings of the Federal Courts are not within the terms of the constitutional provision, such proceedings, nevertheless, must be accorded the same full faith and credit by State courts as would be required in respect to the judicial proceedings of another State. *Hancock Nat. Bank v. Farnum,* 176 U. S., 640, 644, 44 L. Ed., 619, 621, 20 Sup. Ct. Rep., 506; *Embry v. Palmer,* 107 U. S., 3, 9, 27 L. Ed., 346, 2 Sup. Ct. Rep., 25."

On the demurrer the defendant raises the question: "Can a receiver *appointed by a foreign nation* whose authority and right is not disclosed, bring and maintain an action in the courts of this State without first having procured an ancillary appointment upon proper proceedings and thereby place himself and his cause within the jurisdiction of the State courts?" Ordinarily we think so, prima facie at least, in the exercise of general equity jurisdiction.

It is presumed that there were sufficient facts appearing to the judge in making the order reciting "It appearing to the Court that a cause of action exists in favor of" the plaintiff and against the defendant and allowing plaintiff to institute this action against the defendant. We have no statute in this State in reference to foreign receivers.

In *Hall v. R. R.,* 146 N. C., at p. 346, citing numerous authorities, it is held: "The statute of this State (Revisal, sec. 5, subsec. 2, C. S., 8, subsec. 2), positively forbids letters of administration to be issued to a nonresident of the State, and it is to be inferred from this enactment, as well as from the course of decisions of this Court, that the policy of the law is well established to the effect that a nonresident administrator cannot sue in the courts of this State."

In *Kruger v. Bank,* 123 N. C., at p. 18, it is said: "The appointment of receivers in the State of defendant's residence has no extra territorial effect *(Boothe v. Clark,* 17 Howard U. S., 322, 338), though the courts of other States as a matter of comity may permit such receivers to bring actions in their courts where this will not militate to the injury of their own citizens. 6 Thompson Corp., sec. 7334, 7344; *Hunt v. Columbian Ins. Co.,* 55 Me., 290; Beach on Receivers, sec. 685."

In *Person v. Leary,* 127 N. C., at p. 115, this Court said: "We have repeatedly recognized the right of foreign receivers, under the law of comity, to sue in this State. In *Insurance Co. v. Edwards,* 124 N. C., 116, 121, this Court says: 'At this stage of the case we must assume that the suit in Massachusetts was properly conducted, and we see no reason why the courts of that State should not wind up the affairs of its own insolvent corporation. Nor is there any objection to the receiver of a foreign court suing in the courts of this State. What may be the result of that suit is a different matter, but he will be given a hearing.' However, in all such cases there is a preliminary question involving the legal existence of the receiver. His right to sue necessarily depends upon his right to exist, and when this is denied he must prove his right by such evidence as the law requires. The legal identification of a stranger living beyond the jurisdiction of our courts, and coming here only to enjoin the prosecution of a lawful business, is just as important as the identification of one presenting a bank check for payment. Whether or not the check overdraws the account is a matter of little importance, provided the holder has no right to present it, and of such right his own statement would scarcely be deemed conclusive proof. We think that on a motion for a continuation of the injunction, the plaintiffs should have proved their appointment as receivers by a certified transcript, if the fact had been seriously denied." See *In re Chase, ante,* 143.

"While it is thus seen the courts have generally denied the receiver's extra territorial right of action as a question of strict right, it has frequently been recognized as a matter of comity. Thus, it has been held that receivers of a foreign corporation, appointed in other states, might sue in New York, in their official capacity, in cases where no detriment would result to citizens of the latter State, the privilege of thus suing being regarded as based rather upon courtesy than upon strict right, and the courts declining to extend their comity so far as to work detriment to citizens of their own state who have been induced to give credit to the foreign corporation. And the same doctrine prevails in Minnesota." High on Receivers, 3 ed., sec. 241, p. 208.

In 34 Cyc. of Law and Procedure, at p. 486, it is said: "And in many cases foreign receivers are permitted to sue and assert their rights under their appointments, as a matter of comity, when they have authority to sue in the domiciliary state and apparently without adhering to the strict rule denying extra territorial recognition to receivers as such. The recognition of receivers is by comity only, however, and is not extended to the detriment of citizens or the prejudice of resident creditors," citing numerous cases from different states, among them the *Kruger case, supra.*

In 23 R. C. L., part section 151-2, at p. 142-3, the principle is stated: "In the state courts, however, the privilege of suing in jurisdictions other than that of their appointment is almost universally conceded to receivers now, as a matter of comity or courtesy, unless such a suit is inimical to the interest of local creditors, or to the interest of those who have acquired rights under a local statute, or unless such a suit is in contravention of the policy of the forum. As has been said, this privilege is an exception to the general rule, and not a matter of right, and the granting of the permission is discretionary with the court whose aid is invoked. However, this exception has been so often recognized as to have become as firmly established as the rule itself. Whether a state court should permit an action by a receiver appointed by a court of another state, because of the principle of the comity between the States, is a question exclusively for the courts of that state to decide. The right to maintain it is not founded on any provision of a Federal nature, and the United States courts will refuse to supervise the action of the state court in this particular. A receiver desiring to bring suit in another state than that in which he was appointed should file a petition in the court in which he wishes to bring this action, stating the proper facts and asking leave to sue therein. . . . Receivers are generally allowed, upon principles of comity, to maintain an action in another State against the citizens thereof upon contracts for the payment of money which such receivers are fully authorized to collect."

"The policy of the United States in all cases of complaint made by foreigners is to extend to them the same means of redress as is enjoyed by our own citizens. . . . In the courts of the United States alien friends are entitled to claim the same protection of their rights as citizens." Moore's International Law Digest, Vol. 4, sec. 536, p. 7.

Ordinarily a receiver cannot maintain an action in another jurisdiction. As a rule, they have no extra territorial jurisdiction. But the weight of authority is to the effect that the privilege may be granted as a courtesy, not as an obligation—by way of comity, and then only when it will not work a detriment to the citizen of the state in which the jurisdiction is sought. In the progress of the age, the rapid transit and quick means of inter-communication have brought the States of the Union and the nations of the earth in closer alliance than ever before. Commerce is extended to every part of the globe—commercial paper travels with commerce. The present action is based on negotiable notes admitted by the demurrer to be due and unpaid and executed by defendant's testator. The demurrer is founded solely on the ground that a receiver appointed in a court of a foreign nation should not be allowed to sue in this jurisdiction, although the receiver alleges ownership of the notes due and owing, permission granted to sue, order in the foreign court giving authority and direction to bring this suit, and on trial would have to produce the notes in this jurisdiction. We must be friendly with other states and nations if we want other states and nations to be friendly with us. On the facts and circumstances of this case, we think the complaint states a cause of action.

There are other questions that we need not now consider. For the reasons given, the demurrer should be overruled.

Reversed.

F. C. BRINSON, TRUSTEE, v. B. R. LACY, TREASURER, ET AL.

(Filed 28 March, 1928.)

1. **Deeds and Conveyances—Torrens Deeds—Claims Against the State Under Assurance Fund—Mortgages—Notice of Lis Pendens.**

The proceedings by the owner to register his land under the Torrens system is in the nature of proceeding *in rem*, requiring description of the land to be affected, with indexing giving notice, etc., and while pending is notice to a mortgagee thereof without the necessity of the filing of a formal *lis pendens*, and where the mortgagee fails to protect himself under the provisions of the statute, and the title to the land has been assured by the State, and a holder thereof by proper transfer has acquired the title, the negligence of the mortgagee is a complete defense in the mortgagee's action to recover damages against the State thereunder.

2. **Deeds and Conveyances—Torrens Deeds—Demurrer to Action Under Assurance Fund.**

Where in the mortgagee's action against the State Treasurer for damages sustained by reason of the assurance of title by the State to a purchaser under a Torrens deed from the owner of the land, it appears from the pleadings that the damages were caused by his failure, with notice of the proceedings under the Torrens Act, to protect his rights, the demurrer to the pleadings by the defendant should be sustained.

CIVIL ACTION before *Harris, J.*, at September Term, 1927, of JONES.

It is alleged in the complaint that on 1 May, 1916, A. H. Stephens brought action in the Superior Court of JONES County pursuant to the provisions of chapter 90, Public Laws of 1913, and amendments thereto, which is now C. S., ch. 47, and entitled "Land Registration." The purpose of the action was to Torrenize the title of Stephens. The proceeding was concluded on 4 June, 1920, and certificates of title Nos. 12 and 13 were duly issued to the said A. H. Stephens on 5 April, 1920. Thereafter, on 17 June, 1920, said certificates of title were assigned to J. V. Blades. After the Torrens proceeding was instituted, and while it was pending, to wit, on 22 May, 1917, A. H. Stephens executed and delivered to B. F. Pickles, trustee for plaintiffs, a deed of trust covering the same land described in said Torrens proceeding, said deed of trust having been recorded on 1 January, 1918. The plaintiff, Brinson, trustee, has been duly designated as trustee for the plaintiffs in lieu of the said B. F. Pickles. It is further alleged that at the time of accepting the said deed of trust and recording same, the plaintiffs had no knowledge of the Torrens proceeding, and that the title examiner failed to include the said deed of trust to plaintiffs in his report on said title. The plaintiffs brought a suit to foreclose said deed of trust, and thereupon J. V. Blades, the owner of the certificate, restrained the sale of said land.

One phase of this case was considered by the Court in *Blades v. Pickles,* reported in 192 N. C., 812. In that case Blades instituted an action against Pickles, trustee, praying that he be declared the owner of said property in fee simple, and that said deed of trust to Pickles, trustee, for plaintiffs in this action, be declared void. The Court held that the claim of the present plaintiffs who were defendants in the former suit, was barred by the statute of limitations. The jury also found that the present plaintiffs, who were defendants in the former suit, had suffered damage in the sum of $2,305.00.

It was further alleged in the present suit that one-tenth of one per cent of the assessed value of said land had been paid over to B. R. Lacy, State Treasurer, in accordance with the Torrens Act, and known as the assurance fund and so designated in C. S., 2422. The plaintiffs therefore demanded judgment against the State Treasurer for the sum of $2,305, with interest from 1 January, 1918. The defendant, State Treasurer, demurred to the complaint upon the following ground, among others: "The complaint does not state facts sufficient to constitute a cause of action against this defendant in that the complaint does not set forth facts showing that the plaintiffs have, without negligence on their part, sustained loss or damage," etc.

The trial judge overruled the demurrer interposed by the defendant and entered judgment in favor of plaintiffs and against the defendant in the sum of $2,305, with interest from 1 January, 1918, from which said judgment the defendant appealed.

F. C. Brinson and Moore & Dunn for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Siler for defendant.

BROGDEN, J. Does a Torrens proceeding under C. S., ch. 47, entitled "Land Registration," duly commenced prior to the enactment of chapter 31, Public Laws of 1919, constitute *lis pendens?*

Public Laws of 1919, chapter 31, adopted for the entire State what was known as the Buncombe County act relating to *lis pendens,* which provided for cross-indexing, and providing further: "From the cross-indexing of the notice of *lis pendens* only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby." C. S., 502. The Torrens Act, C. S., 2378, declares: "The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land shall be proceedings *in rem* against the land, and the decrees of the court shall operate directly on the land, and vest and establish the title thereto in accordance with the provisions of this chapter." In C. S., 2382, the proceeding is referred to as a "special proceeding *in rem* against all the world." C. S., 2384, provides that the petition in the cause must: (1) be verified; (2) contain a full description of the land to be registered, together with a plot of same by metes and bounds; (3) history of the title; (4) a full statement of all liens, claims, encumbrances, etc. C. S., 2386, provides for a publication containing the names of the petitioners and of all other persons named in the petition "together with a short but accurate description of the land and the relief demanded." C. S., 2388, provides that every decree "shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons," etc.

The record discloses that the proceeding was instituted on 1 May, 1916. On 22 May, 1917, more than one year after the proceeding was instituted, but while it was still pending, the petitioner Stephens executed and delivered to the trustee for the plaintiffs the deed of trust upon the land involved in the proceeding. This deed of trust was recorded 1 January, 1918. The rights of the parties depend upon the law as it existed at the time the transaction took place. If the Torrens proceeding constituted a *lis pendens* under the law upon the subject existing at the time the transaction occurred, then the plaintiffs were charged with notice of the proceeding, and having failed to protect their rights as prescribed by the Torrens Act, they are not entitled to recover against the defendant. The law at the time the deed of trust was made and recorded is thus expressed: "It may, therefore, be taken as well settled that a judgment in an action *in rem* or one to foreclose a mortgage binds not only the parties actually litigating and their privies, but also all others claiming or deriving title under them by a transfer *pendente lite.* The filing a formal *lis pendens* is not required for the application of this recognized principle when the suit is brought in the county where the land is situated." *Walker, J.,* in *Jones v. Williams,* 155 N. C., 179. Also in *Culbreth v. Hall,* 159 N. C., 588, *Brown, J.,* said: "The complaint has all the requisites of a *lis pendens,* and contains the names of the parties, the object of the action, and a description of the land to be affected. It was, therefore, unnecessary to file a separate and formal notice." To the same effect is *Lamm v. Lamm,* 163 N. C., 71, in which the Court held: "Defendant Hinton and his immediate grantor, Dawes, having bought and received their title pending the controversy and after complaint filed fully describing the property situate in the same county, hold the same subject to the results of the suit." So, also, in *Puryear v. Sanford,* 124 N. C., 276, the Court said: "And besides, when the complaint of the plaintiffs was filed, that was *lis pendens,* and all subsequent purchasers would have to take notice of the purposes of the action and of the claim of the plaintiffs." *Collingwood v. Brown,* 106 N. C., 362; *Bird v. Gilliam,* 125 N. C., 76; *Morgan v. Bostic,* 132 N. C., 751. C. S., 2423, provides that "any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein" may institute a suit for compensation for such loss or damage, the recovery to be paid out of the assurance fund in the hands of the State Treasurer. The right of action is given to any person free from negligence. Upon the face of the pleadings the plaintiffs cannot claim that they are free from negligence.

Under the law, as declared in numerous decisions, prior to 1919, the proceeding constituted *lis pendens,* and when the plaintiffs took the deed of trust from Stephens while the suit was pending they hold only as subsequent purchasers subject to be excluded from any interest in the land if they did not pursue the remedies prescribed in the Torrens Act. They took no steps to protect their rights and are therefore not entitled to recover. It follows necessarily that the trial judge should have sustained the demurrer.

Reversed.

E. H. AND J. A. MEADOWS COMPANY AND E. H. MEADOWS, TRUSTEE, AND W. W. GRIFFIN, TRUSTEE, AND THE FIRST NATIONAL BANK OF NEW BERN, v. A. L. BRYAN, ADMINISTRATOR OF MERRILL BRYAN, DECEASED.

(Filed 28 March, 1928.)

1. **Limitation of Actions—On Foreclosure of Mortgage—When Begins to Run Against Holder of Notes in Series—Option of Acceleration.**

   Where notes are given in series, secured by a mortgage on lands providing that upon the nonpayment at maturity of each as they became due all of them were to become due and payable, it is at the option of the mortgagee to enforce the sale upon the happening of the event so specified, and when the mortgagee has not exercised his option, the statute of limitations would apply as from the due date of each note in the series, as if the provision for the acceleration of the payment had not been incorporated in the mortgage.

2. **Bills and Notes—Notes in Series—Option of Holder as to Acceleration—Waiver and Presumption of Waiver.**

   When it does not appear that the mortgagee in a mortgage on lands securing the payment of notes in series has exercised his option to foreclose under a provision making all the notes payable upon the failure of the maker to pay any of them at maturity, the presumption is that he has waived his right to do so, will not be held, on that account, to bar his right to foreclose under the power of sale therein contained.

3. **Judgments—Conclusiveness of Adjudication—Persons Concluded.**

   A judgment in a suit to enjoin the foreclosure sale under mortgage against the administrator of the deceased mortgagor is not *res adjudicata* as to the heirs at law of the deceased who have not been made parties.

4. **Limitations of Actions—On Foreclosure of Mortgage—Extent Foreclosure Barred in Notes in Series—Marshalling.**

   Where the owner of two separate tracts of land has given a mortgage on both, on one to secure notes in series, and against some of the notes the statute of limitations against foreclosure has run, the holder of the first lien is only entitled out of the proceeds of sale of the other tract to receive payment as far as the same may extend on the notes that have not been barred, as against the holder of a second mortgage lien on the second tract of land.

APPEAL by plaintiffs from *Harris, J.,* at October Term, 1927, of CRAVEN. No error.

Action to restrain and enjoin defendant from selling, under the power of sale contained in a mortgage deed from E. W. Bryan to Merrill Bryan, his intestate, lands described therein, upon the allegation (1) that the notes secured by the mortgage have been paid, or (2) if said notes have not been paid, that the power of sale contained in the mortgage deed has become inoperative, under C. S., 2589, for that an action to foreclose said mortgage would be barred by the statute of limitations, C. S., 437, subsection 3.

From judgment on the verdict, dissolving a restraining order issued herein, and thereafter continued to the hearing, and authorizing defendant to execute the power of sale contained in the mortgage deed, plaintiffs appealed to the Supreme Court.

Ward & Ward and Guion & Guion for plaintiffs.
T. D. Warren and H. P. Whitehurst for defendant.

CONNOR, J. On 23 January, 1914, E. W. Bryan and his wife, Minnie Bryan, executed a mortgage deed, by which they conveyed to Merrill Bryan two tracts of land, one containing 14 acres and the other 40 acres, both situate in Craven County, to secure the payment of eight notes of even date therewith, executed by the said E. W. Bryan, under seal, and aggregating the sum of $1,600. Each of said notes is for the sum of $200. They are due and payable, according to their tenor, in succession, on the first day of January, 1915, and on the first day of January of each year thereafter, up to and including the year 1922. There is no provision in said notes, or in either of them, by which their maturity is accelerated, upon default in the payment of any one of the notes, when it shall become due, according to its tenor, nor is there any reference in the notes to the provision in the mortgage deed by which all said notes shall become due and the power of sale executed by the mortgagee upon such default. The mortgage deed contains a provision by the terms of which, upon default in the payment of any one of said notes, "The entire debt shall be due and payable, and the parties of the first part in such case do hereby authorize and fully empower the said party of the second part, his heirs, executors, administrators and assigns to sell" the lands conveyed by the mortgage deed, at the courthouse door in New Bern, N. C., after advertising, etc.

The said mortgage deed from E. W. Bryan and his wife, Minnie Bryan, to Merrill Bryan, was duly recorded in the office of the register of deeds of Craven County on 23 February, 1914.

During the year 1923 E. W. Bryan executed and delivered to W. W. Griffin, trustee, a deed of trust for the purpose of securing the payment of his note to the National Bank of New Bern for the sum of $500; during the said year the said E. W. Bryan also executed and delivered to E. H. Meadows, trustee, a deed of trust for the purpose of securing the payment of his note to E. H. and J. A. Meadows Company for the sum of $5,473.24. The tract of land, containing forty acres, conveyed by the mortgage deed to Merrill Bryan, is conveyed to said trustees respectively by each of the said deeds of trust. Both said deeds of trust have been duly recorded in the office of the register of deeds of Craven County.

Merrill Bryan died, intestate, during the year 1916. The defendant, A. L. Bryan has been duly appointed and has duly qualified as administrator *d. b. n.* of the said Merrill Bryan, deceased. E. W. Bryan died during the year 1925. His son, Edgar Ford Bryan, has been duly appointed and has duly qualified as administrator of the said E. W. Bryan.

Some time prior to 15 March, 1927, the defendant, A. L. Bryan, as administrator of Merrill Bryan, deceased, advertised the lands conveyed by the mortgage deed of E. W. Bryan to Merrill Bryan, for sale, on said day, at the courthouse door in New Bern, N. C. Thereupon this action was begun in the Superior Court of Craven County by the plaintiffs to have the defendant, A. L. Bryan, administrator of Merrill Bryan, restrained and enjoined from selling said lands under the power of sale contained in the mortgage deed from E. W. Bryan to Merrill Bryan. Plaintiffs allege that the notes secured by said mortgage have been paid; but that, if they have not been paid, the power of sale contained in said mortgage has become inoperative under C. S., 2589, for that an action to foreclose said mortgage deed would be barred by the statute of limitations, C. S., 437, subsec. 3, more than ten years having elapsed since the maturity of said notes, and E. W. Bryan, the mortgagor, and those claiming under him, having been in possession of said land since the date of the execution of said mortgage deed.

At the trial, in answer to issues submitted by the court, the jury found that the notes secured by the mortgage deed from E. W. Bryan to Merrill Bryan have not been paid, and that an action to foreclose the said mortgage would not have been barred by the statute of limitations. From the judgment in accordance with the verdict, dissolving the restraining order issued at the time of the commencement of this action, and thereafter continued to the hearing, and authorizing the defendant to sell the lands conveyed by the mortgage deed from E. W. Bryan to Merrill Bryan, under the power of sale contained in said mortgage, plaintiffs appealed to this Court.

The determinative question presented for decision by this appeal is, whether or not upon default in the payment of one of a series of notes, at its maturity, all of said notes being secured by a mortgage or deed of trust, containing a provision by the terms of which all said notes not due at the date of such default, shall become due and payable at such date, for the purpose of foreclosure, the statute of limitations—C. S., 437, subsec. 3—applicable in an action to foreclose the mortgage or deed of trust, begins to run from the date of such default, when the holder or holders of said notes has taken no action, under the provision for the acceleration of the maturity of said notes contained in the mortgage or deed of trust, with respect to such acceleration.

C. S., 437, subsection 3, provides that an action for the foreclosure of a mortgage or deed of trust for the benefit of creditors, with a power of sale, of real property, where the mortgagor or grantor has been in possession of such property, must be commenced within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same. If the question above stated must be answered in the affirmative, then a power of sale contained in a mortgage or deed of trust becomes inoperative at the expiration of ten years from the date of default in the payment of any one of a series of notes secured by a mortgage or deed of trust, containing a provision for the acceleration of the maturity of notes, not due, according to their tenor, at the date of such default, and the mortgagee or trustee is without power to sell the land, under the power of sale where the mortgagor or grantor has been in possession of the land. C. S., 2589 is as follows: "The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations."

There is no provision in the notes executed by E. W. Bryan and payable to Merrill Bryan, by the terms of which the maturity of the notes, not due according to their tenor, is accelerated upon default in the payment of any one of said notes; the provision for the acceleration of the maturity of said notes is contained in the mortgage, securing the same. This provision is applicable, therefore, only to the foreclosure of such mortgage, under the power of sale, or by civil action. The principle as stated in the opinion in *Walter v. Kilpatrick,* 191 N. C., 458, is, however, applicable to the facts in the instant case. In the opinion in that case it is said: "A provision for the acceleration of the maturity of a note or of notes in a series, upon default of the maker, is not automatic; such acceleration is at the option of the holder or holders of the note or notes; the option may be exercised by a holder only upon default by the maker. By paying the interest when due, or by paying each note of the series, as it matures, in accordance with his promise, the maker can deprive the holder of any and all rights under the agreement for acceleration; the right of acceleration may be waived by the holder of the note or notes, containing the agreement. An action upon a note accrues, at its maturity, according to its tenor, notwithstanding a provision for acceleration, if acceleration is waived or not enforced by the holder. 13 R. C. L., 909, sec. 97; 8 C. J., p. 138, sec. 237-242, p. 415, sec. 610."

A provision in a mortgage or deed of trust by the terms of which the maturity of a note or of notes secured thereby, is accelerated, for the purpose of foreclosure, upon a default of the maker, confers upon the mortgagee or trustee an option to foreclose, at the date of such default, by the exercise of a power of sale, contained in the mortgage or deed of trust, or by civil action. This option may be waived by the mortgagee, or by the holder of the notes secured by the deed of trust. In the absence of evidence tending to show some action on the part of the mortgagee, or on the part of the holder of the notes, pursuant to the provision for the acceleration of the maturity of notes not due according to their tenor, at the date of the default, such waiver will be conclusively presumed. In that event the statute of limitations will not begin to run from the date of such default, and an action to foreclose said mortgage or deed of trust will not be barred, until after the expiration of ten years from the maturity of all the notes secured thereby, notwithstanding the provision for the acceleration of the maturity of notes not due at date of such default. A power of sale contained in a mortgage or deed of trust may be exercised at any time within ten years after the maturity of any note, secured by the said mortgage or deed of trust, according to its tenor, for the purpose of enforcing its payment out of the proceeds of a sale of the land.

The foregoing statement of the law applicable to a decision of the question presented by this appeal is in accord with authoritative decisions of this Court.

In *Scott v. Lumber Co.*, 144 N. C., 44, *Clark, C. J.*, in disposing of a contention of the plaintiffs in that case that a power of sale had become inoperative at the time it was exercised, because of the lapse of ten years after the date of a default in the payment of interest on the note, secured by the mortgage, says: "It is true there was also power of sale for default in payment of annual interest, but it does not appear that there was such default, and, if shown, the sale being optional, there could be no foundation for the running of the statute till 1893 (when the note matured according to its tenor), independent of the ruling in *Menzel v.*

Hinton, 132 N. C., 660, that there is no limitation as to power of sale (since changed by statute, C. S., 2589)."

In *Cone v. Hyatt,* 132 N. C., 810, *Walker, J.,* referring to a provision in a mortgage for the acceleration of the maturity of the debt secured thereby, upon a default of the debtor, quotes with approval from the opinion in *Lowenstein v. Phelan,* 17 Neb., 430, the following words:

"The provision, however, is for the benefit of the mortgagee to enable him to procure the money loaned at the time it was agreed to be paid. If the mortgagee so desires, he may institute an action upon default to foreclose, and upon obtaining a decree, have the premises sold. He need not do so, however. The stipulation being for his benefit, he may waive it without putting himself in default."

In *Capehart v. Dettrick,* 91 N. C., 344, it was held that where a deed of trust, made to secure a series of notes, due at different times, provides that in default of the payment of the same, or of any part thereof, at maturity, the whole shall become due and payable, the only effect of the provision is to allow a foreclosure upon the default, and an application of the proceeds of a sale of the property to all the notes at once, and that default does not start the running of the statute of limitations against the notes not due at the date of the default.

The question presented for decision must be answered in the negative. Plaintiffs' assignment of error based upon exceptions to the charge of the court to the jury are not sustained. The jury were correctly instructed that upon all the evidence in this case the power of sale in the mortgage from E. W. Bryan to Merrill Bryan was not inoperative, under the statute—C. S., 2589—at the date of the commencement of this action.

There is a paragraph included in the judgment rendered by the Superior Court in this action by which it is ordered and adjudged "that the aforesaid notes and mortgage securing the same are valid and enforceable obligations against the estate of E. W. Bryan, and that they are not barred by the statute of limitations."

Neither the administrator nor the heirs at law of E. W. Bryan are parties to this action; this adjudication is therefore not *res adjudicata* as against said administrator or heirs at law. Nor, as we interpret the language of the judgment, is the adjudication *res adjudicata* as against the plaintiffs, with respect to the proceeds of the sale of the tract of land containing forty acres. The first three notes, secured by the mortgage from E. W. Bryan to Merrill Bryan, matured more than ten years before the commencement of this action; they are therefore barred by the statute of limitations and cannot be paid out of the proceeds of a sale of the forty-acre tract, as against the plaintiffs, claiming under liens subsequent to the mortgage. *Graves v. Howard,* 159 N. C., 594.

If upon the foreclosure of the mortgage from E. W. Bryan to Merrill Bryan the tract of land, containing fourteen acres, which is not included in either of the deeds of trust, under which plaintiffs claim, does not bring a sum sufficient to pay the notes secured thereby, together with the costs and expenses of the sale, and it therefore becomes necessary to sell the forty-acre tract, then as against the plaintiffs, only the amount due on the five notes which were not barred by the statute of limitations at the date of the commencement of this action, may be paid out of the amount received for the said forty-acre tract. The judgment as thus interpreted by us is affirmed.

No error.

T. L. CAVES v. ERWIN COTTON MILLS COMPANY.

(Filed 28 March, 1928.)

Negligence—Acts or Omissions Constitute Negligence in General.

An action to recover damages for a negligent injury will be dismissed when the evidence discloses that it resulted from an accident from an unknown cause or a known cause which could not have been reasonably anticipated.

APPEAL by plaintiff from *Bond, J.,* at December Term, 1927, of ROBESON. Affirmed.

Britt & Britt and Charles R. Britt for plaintiff.
Varser, Lawrence, Proctor & McIntyre for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the defendant's negligence. He alleged that while engaged in marking the name of a purchaser on bundles of cloth he was injured by the falling on his left leg of a bale which had negligently been stored on its round end. At the close of the evidence the action was dismissed as in case of nonsuit. The testimony discloses an alleged injury resulting from an accident—an event proceeding from an unknown cause or an unusual and unexpected event from a known cause. The judgment is

Affirmed.

LADIES BENEVOLENT SOCIETY ET AL. v. E. A. ORRELL ET AL.

(Filed 4 April, 1928.)

1. **Wills—Construction—Nature of Estates and Interests Created—Devise of Full Beneficial Interest Carries Title.**

   A devise of the full beneficial interest in lands in trust as the rents and profits therefrom, vests the title and right of possession in the trustee, when not in conflict with the law against perpetuities, and when there is no clearly expressed intent of the testator that the lands and the income are to be separately regarded.

2. **Wills—Construction—Designation of Devisees—Ambiguity—Extrinsic Evidence—Charitable Trusts.**

   Where there is ambiguity in the terms of a will as to the identity of the beneficiary of a charitable trust, extrinsic evidence of identification may be liberally shown, when not in conflict with the terms of the written instrument.

3. **Same—Words Creating Trust.**

   A devise of all the income and profits of lands in trust for a charitable organization of a certain church "to be used by the stewards of the church in defraying the expenses of the institution" is a sufficient designation of the stewards of that church as trustees for the execution of the trust contemplated by the instrument, and to vest in them the title and right of possession for its purposes.

4. **Trusts—Construction and Operation—Court May Appoint Trustee for Charitable Trust.**

   Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or the one designated fails or refuses to act, or one may be appointed under the provisions of our statute, C. S., 4023.

APPEAL by plaintiffs from *Devin, J.*, at December Term, 1927, of NEW HANOVER. Remanded.

McNorton & McIntire and Rountree & Carr for appellants.

ADAMS, J. The controversy turns upon the construction of the following paragraph in the will of the late Thomas R. Radcliffe: "My beloved wife Mildred LaTreille Radcliffe to have and to hold all of my personal property, furniture, jewelry, bonds and everything except such as hereinafter bequeathed; she is also to have for the period of her natural life the income from rents from my real estate situate in the city of Wilmington, county of New Hanover, and State of North Carolina, and also of any property or interests that I may acquire subsequent to this will. My wife aforementioned is not to sell or dispose of any of the said real estate, and upon her death I bequeath the income from it to the Old Ladies Home, a charitable institution in Wilmington, North Carolina, attached to Grace Methodist Episcopal Church of that city. This income shall, in case of my wife's death, be used by the stewards of said church in defraying the expenses of said institution, and shall be known as the 'Robert S. Radcliffe Fund.'"

The testator died on 10 March, 1892, seized of six lots in the city of Wilmington, which are the subject of this controversy; his will was probated on 19 March, 1892; his wife died on 15 October, 1926. The Ladies Benevolent Society, which was incorporated by the General Assembly in 1852, was authorized to sue and be sued, to acquire and transfer property, and to make by-laws for its government. The plaintiffs allege in effect that this Society is a benevolent organization engaged chiefly in maintaining the Old Ladies Home, now known as the Catherine Kennedy Home; that pursuant to its policy and in compliance with its rules the church named in the devise periodically elects a board of stewards for conducting its temporal affairs; that the plaintiffs, other than the Ladies Benevolent Society, are members of this board; and that the income from the several lots in controversy was devised after the death of Mrs. Radcliffe to the Ladies Benevolent Society or to the board of stewards for the use and benefit of the Catherine Kennedy Home. It is alleged also that the defendants claim an interest in these lots, some as the paternal and some as the maternal heirs of the testator, and that certain of the defendants are in possession of a part of the property. The defendants introduced no evidence, and the only issue was whether the plaintiffs are entitled to the income from the real estate described in the will. The jury returned an affirmative answer and the plaintiffs tendered a judgment declaring the Ladies Benevolent Society to be the owner in fee and entitled to the immediate possession of the lots described in the will, to be held in trust for the Old Ladies Home, or the Catherine Kennedy Home. The judge declined to sign this judgment, but rendered another adjudging that the Ladies Benevolent Society is the owner of the income from the devised property. The plaintiffs excepted and appealed upon error assigned in the record.

It is regarded as settled that within the limits of the rule against perpetuities and in the absence of a clear intention to separate the income from the principal an absolute devise of the income from land passes the land itself. The rule, founded perhaps on the feudal law, was thus expressed by *Lord Coke:* "If a man seized of lands in fee by his deed granteth to another the profits of those lands, and to have and to hold to him and his heirs, and maketh livery *secundum forman chartæ,* the whole land itself doth pass; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, and all whatsoever parcell of that land doth passe." Coke on Littleton, 4 b; Jarman on Wills, 1297; Page on Wills, secs. 846, 1023; *South v. Alleine,* 91 Eng. Reports, 202; *Doe v. Lakeman,* 109 *ibid.,* 1054, 1057; *Reed v. Reed,* 9 Mass., 372; *Green v. Biddle,* 8 Wheaton, 1, 76, 5 Law Ed., 547, 566. It is a rule which has survived the system on which it is said to have been based and in proper cases is generally applied in determining titles to real property. In *Perry v. Hackney,* 142 N. C., 368, this Court cited and approved authorities to the effect that the words "all my rent," "rents, issues, and income," and similar expressions were sufficient to pass real estate—a principle adhered to in *Haliburton v. Phifer,* 185 N. C., 366. We are of opinion, therefore, that the devise of the income passed the real estate from which the income is derived.

After giving his wife the income for life and forbidding her disposition of any of the lots, the testator devised the income to the Old Ladies Home. The appellants introduced evidence that the testator knew and spoke of this "charitable institution" as the "Old Ladies Home," though it was sometimes referred to as the "Old Ladies Rest," and that there is no other such institution in the city. It is perfectly obvious, both from his specific designation of the institution and from his expressed desire to defray its expenses that the testator intended, after the death of his wife, to provide for the Old Ladies Home as the special object of his bounty; and his purpose should not be defeated for want of an organized or corporate entity. One of the contested points is whether the Catherine Kennedy Home, founded by the Ladies Benevolent Society, is the Old Ladies Home maintained under another name; and pertinent to this question is the well-known principle that extrinsic evidence is admissible in explanation of a latent ambiguity. *Gilbert v. Wright, ante,* 165. "Where the description of the beneficiary is ambiguous, the court allows considerable latitude in the admission of extrinsic evidence to identify such beneficiary, although such evidence cannot be used to contradict the terms of the will. A very common form of misnomer or misdescription of a beneficiary is found where testator attempts to make a devise or bequest in favor of a corporation, generally a religious or charitable institution. In such cases, where either the name or the description given in the will corresponds in part to the name or description of any existing corporation, extrinsic evidence of the relation of testator to such corporation is admissible as tending to show his intention to devise or bequeath property to such corporation. Where the name of the beneficiary corporation, as given in the will, does not correspond to the name of any corporation in existence, it is always admissible to show testator's acquaintance with, and interest in, an existing corporation or institution which corresponds in some respects, either in name or description, to that spoken of in the will." Page on Wills, sec. 1418; *Tilley v. Ellis,* 119 N. C., 233; *Keith v. Scales,* 124 N. C., 497; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273. Moreover, it is provided by statute that no gift, grant, bequest, or devise shall be invalid by reason of any indefiniteness or uncertainty as to the objects or beneficiaries of such trust. Laws 1925, ch. 264. We see no reason for disturbing the verdict on the asserted ground that the beneficiary named in the will is not ascertainable.

We have said that a devise of the income from land ordinarily passes the land, but not always; it is otherwise if the testator expresses or indicates an intention inconsistent with the transfer of the legal title to the beneficiary—that is, if he indicates an intention to separate the income from the principal. As one of the usual modes of indicating such intention is by the appointment of a trustee, we are next to determine whether the testator made such appointment; and it may be admitted that he did not designate a trustee *eo nomine.* This, however, is not necessary; the designation of the trustee may be indirect or by implication; technical language is no more essential to the appointment of a trustee than to the declaration of a trust. If the duties imposed upon the person named involve the use of the devised property for the benefit of another, or if upon such person there is laid an obligation arising out of a confidence reposed in him faithfully to use the property according to such confidence, a trust is created, although the word "trustee" or the words "upon trust" are not used. 39 Cyc., 252; Perry on Trusts, sec. 2, 158. In the will the testator inserted the clause, "This income shall in case of my wife's death be used by the stewards of said church in defraying the expenses of said institution and shall be known as the 'Robert S. Radcliffe Fund.'" He thus reposes in the stewards the confidence that they will use the "income" for a definitely indicated purpose, and by implication creates them trustees of an express trust. For several reasons it does not follow from the evidence, under the principle heretofore stated, that a gift of the income passes the land to the Old Ladies Home or to the Ladies Benevolent Society: (1) the latter is not named in the will; (2) there is no evidence that the Old Ladies Home was an organized or corporate entity when the will was made; (3) the testator indicated a contrary intent by the terms of the devise.

It has been suggested that the board of stewards waived all claim to the property, and that the coplaintiff is entitled to it; but as a trustee's assent is not necessary to the validity of a trust and as his acceptance is presumed until he declines (26 R. C. L., 1274), we are not disposed to hold that such waiver is sufficient to divest the legal title. If the stewards decline to accept the trust, a trustee may be appointed either by virtue of the statute or by the Superior Court in the exercise of its equitable jurisdiction. C. S., 4023, Laws 1925, ch. 264; *Goodrum v. Goodrum,* 43 N. C., 313; *Keith v. Scales, supra; Church v. Trustees,* 158 N. C., 119.

Our conclusion is that upon the death of Mrs. Radcliffe, the life tenant, the legal title to the several parcels of land embraced in the will and described in the complaint vested, not in the Ladies Benevolent Society, but in the board of stewards of Grace Methodist Episcopal Church, South, who shall hold the devised property as an express trust and apply the income therefrom (to be known as the "Robert S. Radcliffe Fund") in defraying the expenses of the Catherine Kennedy Home, formerly known as the Old Ladies Home, the "charitable institution" described in the testator's will. In this respect and to this extent the judgment of the Superior Court will be modified. It follows that the judgment tendered by the plaintiffs was properly declined.

We are not inadvertent to the jury's response to the issue as applicable to all the plaintiffs, but it is obviously inexpedient to incur the expense of another trial for the correction of a technicality on which the appellants do not insist.

The cause is remanded for judgment in conformity with this opinion.

Remanded.

W. V. BUTLER v. ARMOUR FERTILIZER WORKS.

(Filed 4 April, 1928.)

1. **Release—Requisites and Validity—Fraud in Procurement—Evidence Thereof.**

   When the defendant relies upon a release signed by the plaintiff to bar his action to recover damages for an alleged negligent injury, it is competent for the plaintiff to testify on the issue of fraud in the procurement that at the time he executed the release he was confined in the hospital, suffering from the injury and without financial means, and that his condition was known to the defendant's agent who thus procured the release by fraud.

2. **Evidence—Competency—Facts in Issue and Relevant to Issues—Evidence Competent on One Issue—Instruction Confining Evidence to One Issue Must be Requested—Rule of Court.**

   The admission of evidence at the trial that is competent on one of the issues involved will not be held for error as not being competent upon the others, unless the objecting party duly requests that it be confined to the issue upon which it is competent. Rule 21.

3. **Evidence—Expert Testimony—Subjects—X-ray Pictures—Percentage of Disability.**

   One who has qualified as an expert osteopath may testify from his examination of his patient and from the X-ray he has taken of the injury as to the permanent effect it has had on his patient, in an action to recover damages caused by the negligence of the defendant, and his expressing in percentage the proportion of its effect is not a ground for error.

4. **Release—Requisites and Validity—Fraud in Procurement—Evidence Thereof.**

The gross inadequacy of the money paid to obtain a release for damages resulting from an injury is an element to be considered upon the question of fraud in its procurement, and is sufficient to sustain an affirmative answer to the issue.

5. **Damages—Measure of Damages—Permanent Injury—Negligence.**

An instruction upon the evidence is not erroneous that damages to be awarded for a permanent injury negligently inflicted are the present worth of such amount as is a fair compensation for all physical injury, past, present, and prospective and for diminished earning capacity which are direct and necessary consequences of the defendant's negligence, and also a fair compensation for the physical suffering.

6. **Same—Instructions—Verdict—Jury.**

When the trial judge has correctly charged as to the amount of damages recoverable in a personal injury negligence case, it will not be held for error that he had failed to exclude in the defendant's behalf such sums that it had already paid, when the plaintiff had admitted receiving them, and it appears from trial and verdict that the jury had accordingly reduced the amount of their verdict.

APPEAL by defendant from *Devin, J.*, at September Term, 1927, of NEW HANOVER. No error.

Action to recover damages for personal injury, sustained by plaintiff, while engaged in work as an employee of defendant, caused, as alleged in the complaint, by the negligence of defendant. Defendant denies liability; it also pleads in its answer, as a bar to plaintiff's recovery in this action, a release signed by him, while he was in the hospital under treatment for his injury.

The issues submitted to the jury were answered as follows:

1. Was the execution of the release by the plaintiff procured by the fraud of the defendant? Answer: Yes.

2. Was the plaintiff injured by the negligence of defendant as alleged in the complaint? Answer: Yes.

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

4. What damages, if any, is plaintiff entitled to recover of defendant? Answer: $5,000.

From judgment on the verdict, defendant appealed to the Supreme Court.

L. Clayton Grant, A. G. Ricaud and Bryan & Campbell for plaintiff.
W. C. Kirk and John D. Bellamy & Sons for defendant.

CONNOR, J. This action was first heard in this Court upon defendant's appeal from an order of the judge of the Superior Court of New Hanover County, denying defendant's motion for the removal of the action from said court to the District Court of the United States for the Eastern District of North Carolina, for trial. The order was affirmed. 192 N. C., 510.

The action was next heard in this Court upon plaintiff's appeal from the judgment at a trial in the Superior Court of New Hanover County, dismissing the action upon defendant's motion, at the close of plaintiff's evidence, for nonsuit. C. S., 567. The judgment was reversed. 193 N. C., 632.

The action has since been tried upon the issues raised by the pleadings. From the judgment upon an adverse verdict, defendant has appealed to this Court, assigning errors in decisions made by the court below upon matters of law or legal inference. This Court is asked to review these decisions, and to sustain assignments of error made by defendant as appellant.

The evidence offered by the plaintiff at the last trial is substantially the same as that offered by him at the former trial. Upon plaintiff's appeal from the judgment dismissing the action at the former trial, we held that the evidence offered by him at said trial tended to establish the allegations of the complaint, with respect to the cause and extent of his injuries; we also held that said evidence does not show, or tend to show, that plaintiff contributed by his own negligence to his injuries, and that he is thereby barred of recovery in this action, if the jury should find from the evidence that he was injured by the negligence of defendant, as alleged in the complaint; we further held that the evidence offered by the plaintiff to show matters in avoidance of the release, relied upon by defendant as a discharge of its liability to plaintiff in this action, should have been submitted to the jury. Defendant's assignment of error upon this appeal, based upon its exception to the refusal of the court to allow its motion for nonsuit, first made at the close of plaintiff's evidence, and then renewed at the close of all the evidence, cannot be sustained. The principles of law applicable to the facts which plaintiff's evidence tends to show, are discussed, with citations of authorities in the opinion upon the former appeal, 193 N. C., 632. No other principles are presented by the assignment of error upon this appeal. We find no error in the refusal of defendant's motion for judgment as of nonsuit. The evidence was properly submitted to the jury upon the trial of the issues raised by the pleadings.

Defendant assigns as error the admission of the testimony of plaintiff on his direct examination as a witness in his own behalf to the effect that at the time he was injured he was without funds with which to provide for the support of his wife and himself. This testimony was offered as evidence upon the first issue, which involved the validity of the release, signed by plaintiff, while he was in the hospital. Plaintiff contended that the execution of this release by him was procured by the fraud of defendant's superintendent, acting in its behalf. It was competent for him to show his condition, financial and otherwise, known to the superintendent at the time he signed the release. "Whenever a person is in peculiar necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration or the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively." 2 Pom. Eq. Jur., sec. 984. Cited and approved in *King v. R. R.,* 157 N. C., 44. There was no error in overruling defendant's objections to the admission of this testimony as evidence. It was competent upon the first issue. It was, of course, not competent upon either of the other issues, involving defendant's liability to plaintiff or the amount which plaintiff is entitled to recover in this action as damages. Defendant did not ask, at the time of its admission, that the evidence be restricted to the first issue. The fact that it was competent upon this issue, but not competent upon the other issues, is not sufficient ground for defendant's exception upon the record. Rule 21, Rules of Practice in the Supreme Court, 192 N. C., 849.

Defendant further assigns as error the admission of the testimony of Dr. M. J. Carson, an expert osteopath, that in his opinion, formed after a personal examination of plaintiff's leg, and after his study of an X-ray picture of plaintiff's right hip, made by the witness, plaintiff had suffered an impairment of his leg, by reason of the injury, of from twenty to thirty per cent. The court had found that this witness is an expert osteopath. There are no exceptions to this finding. The witness had first testified that he had an opinion satisfactory to himself as to the extent of plaintiff's injury. The testimony was competent as evidence to be considered by the jury as to the extent of such injury. *Ferebee v. R. R.,* 167 N. C., 290. It was not incompetent because witness' opinion was founded partly upon an X-ray picture. *Lupton v. Express Co.,* 169 N. C., 671. Nor was its competency affected by the fact that the witness expressed his opinion as to the extent of the injury, in terms of percentage. *Ridge v. R. R.,* 167 N. C., 510. In the last cited case, it is held that it was competent for the doctors to state what effect, if any, in their opinion, the broken vertebra would have upon their patient's physical and mental condition.

With respect to the first issue, the court instructed the jury as follows: "If the jury should find from the evidence, and by its greater weight, that the plaintiff was injured through the negligence of the defendant, as alleged in the complaint, and that he was further seriously and permanently injured, which injuries caused him to suffer considerable or great excruciating pain, and which injuries were serious and permanent in their nature, and that the plaintiff's earning capacity was seriously or partially impaired, and should further find that a reasonable compensation for the plaintiff's suffering, injuries, and impairment of his earning capacity was worth a sum considerably in excess of the amount which the defendant paid to the plaintiff for said release, and that the amount or sum of money so paid by the defendant to the plaintiff was so grossly inadequate to what would be reasonable compensation to the plaintiff for his injuries, and suffering, as would cause a reasonable, fair-minded person to say that the sum so paid plaintiff was so small in comparison to the amount the plaintiff was actually entitled to receive, that it amounted to practically nothing, then the jury should consider such fact in determining whether the release was obtained by fraud, and if they should reach such conclusion from such fact alone, then the jury should answer the first issue, 'Yes.' "

Defendant excepted to this instruction. It contends that the instruction is erroneous, for that the jury were instructed that mere inadequacy of consideration for the release was sufficient to justify a finding by the jury that the execution of the release was procured by fraud. We do not so construe the instruction. The jury was instructed that if they should find that the consideration for the release was grossly inadequate, then such fact alone rendered the release voidable on the ground of fraud, and that they should answer the first issue in the affirmative. Mere inadequacy of consideration, while a circumstance properly to be considered by the jury, together with other relevant circumstances, upon an issue involving an allegation of the fraudulent procurement of a contract, is not sufficient to sustain an affirmative answer to the issue. When, however, the consideration is found by the jury to be not only inadequate, but grossly so, this fact alone is sufficient evidence to sustain the allegation of fraud. The instruction given to the jury upon the trial of this case, is in accord with the rule as stated by *Allen, J.*, in *Knight v. Bridge Co.*, 172 N. C., 393. After a review of the authorities cited in his opinion, *Justice Allen* says:

"The rule amounts to this: The owner of tangible property, or of a claim for damages may give it away or may sell it for less than its value, and the contract is valid in the absence of fraud, undue influence, or oppression; but if the contract is attacked as fraudulent, the inadequacy of consideration is evidence of fraud, and, if gross, is alone sufficient to carry the case to the jury on the issue of fraud."

With respect to the fourth issue, the court instructed the jury as follows:

"If you come to that issue, gentlemen, the plaintiff would be entitled, if you answer this issue, to such amount as you find from the evidence would be a fair, just and reasonable compensation to him for all physical injury, past, present and prospective, which was a direct and necessary consequence of the defendant's negligence, if by your answers to the other issues you have found that defendant was negligent in causing this injury. That would include compensation for physical pain and suffering endured, for any loss of time or expense caused him by reason thereof, and if you find from the evidence and by its greater weight that the plaintiff's thigh bone or hip bone was broken, and by reason thereof a permanent injury was inflicted upon the plaintiff whereby he was caused to limp and suffer discomfort and humiliation in getting about with a stick, and that it is necessary to do so to assist him in walking, and if you find by reason of such injury his ability to earn a living—his earning capacity—has been permanently impaired and diminished, then you would ascertain from the testimony what you find to be the extent of that impairment and the amount you find to be the present value of such diminished earnings during such period as you find it will continue to exist. The plaintiff would be entitled to have you answer the issue in dollars, or in money, such sum as you find would be a reasonable compensation to him—a full, fair, just compensation, no more, no less—and in passing upon it you will not be influenced by any consideration except the testimony as you find it to be."

Plaintiff, testifying as a witness in his own behalf admitted that defendant had paid him $300, while he was in the hospital, under treatment for his injury. He testified that this sum was paid him as compensation for his lost time, as estimated by defendant at the time it was paid. He also testified that defendant paid, on account of his hospital expenses and medical bill, the sum of $278. Defendant contends that the answer of the jury to the fourth issue should have been set aside by the court, because it does not affirmatively appear that the jury deducted these sums from the amount of damages which they found plaintiff was entitled to recover of defendant, or that in any event these sums should be deducted from the amount found by the jury as plaintiff's damage, resulting from his injury. Neither of these contentions can be sustained. In view of the testimony of the plaintiff with respect to these items, it must be assumed that the jury did not include in the amount of damages which they found plaintiff was entitled to recover of defendant, either compensation for lost time, covered by the payment of $300, or compensation for the hospital expenses and medical bill paid by defendant, and not by plaintiff. Plaintiff contended that he was entitled to recover as damages a sum much larger than $5,000. It does not appear that the jury included in their award of damages, sums for which defendant was liable, but which it had already paid.

There was conflict in the evidence as to defendant's liability to plaintiff in this action. This evidence was submitted to the jury, who alone may find the facts upon which liability, under the law, is to be determined. This Court may review only decisions upon matters of law and legal inference made by the presiding judge, and properly presented for such review by appeal. Upon such review we find

No error.

W. C. CHAUNCY v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 April, 1928.)

Property—Nature—Fructus Naturales; Fructus Industriales—Lessee Not Entitled to Damages for Negligent Destruction of Fructus Naturales—Landlord and Tenant—Crops.

Broom sage growing upon leased farm land, not requiring cultivation, is not regarded as *fructus industriales* or in the nature of personal property belonging to the tenant, except as to so much as may be required by him in connection with the use of the land; and where the land has broom sage growing thereon, he is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except only for its value for farming purposes on its leased premises.

APPEAL by defendant from *Harris, J.*, and a jury, at September Term, 1927, of PITT. New trial.

This is an action for actionable negligence brought by plaintiff against defendant, who was in possession of certain lands, 25 acres, under lease for 1923.

The plaintiff alleges: "That at the time of said destruction of plaintiff's said field of broom sage, through the negligence and carelessness of defendant, its servants and agents, plaintiff was marketing said broom sage in bales for use by horse dealers and livery stables, as bedding for horses and cattle, and that said broom sage thus marketed had a commercial or market value of $15.00 per ton, and that at the time said fire complained of, plaintiff had sold all of said twenty-five acres of broom sage and had a contract for delivery of same in bales to one J. E. Winslow, Greenville, North Carolina, at an agreed price of $15.00 per ton, and that said twenty-five acre field of broom sage before its destruction by fire through the negligence and carelessness of defendant as herein set out and complained of, had a conservatively estimated yield for the current year of one ton of broom sage per acre, at a total market value for the twenty-five acres sold and contracted for by J. E. Winslow, of $375.00, less the expense of cutting, baling and marketing of $5.00 per acre, or a total expense of said twenty-five acres of $125.00, leaving the net profit or value of said twenty-five acres of broom sage, destroyed as aforesaid, at a total loss to plaintiff of $250.00."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was plaintiff, on 10 March, 1923, in possession, under lease of the premises described in the fourth paragraph of the complaint? Answer: Yes.

"2. Was the fire damage complained of caused by the negligence and carelessness of the defendant, its agents or employees? Answer: Yes.

"3. If so, what amount in damage is plaintiff entitled to recover of defendant by reason thereof? Answer: $175.00."

The material facts and assignments of error will be considered in the opinion.

D. M. Clark for plaintiff.
Skinner, Cooper & Whedbee for defendant.

CLARKSON, J. The plaintiff testified, in part: "I entered possession of this land sometime in February, 1923, I did not plant this broom sage, nobody plants it. I do not think I ever heard of anybody planting it. I do not know that a lot of work is done by people trying to get rid of it any more than any other grass or weed. It grows on land laying out, on land you let lay out is where it grows. It requires no cultivation at all. It grows from year to year. I really think it will produce more thrifty once in a while if you cut it than where you do not. This broom sage was already growing on the land when I rented it and the straw that was upon the place when I rented it. It was the straw that was burned. . . . I had not cut on this farm and at the time of the fire, the broom sage was standing there in the same condition as when I leased the place. I had contracted to sell it. . . . All I engaged to sell was that I had on this particular farm."

There was no evidence in the record that the lessor of plaintiff had sold him this growing, uncut broom straw. The plaintiff rented the land for the year 1923, and the broom straw was burned, it is alleged, by the negligence of the defendant, when standing and growing uncut.

The principle is set forth in Vol. 1, Thompson on Real Property, part sec. 117, p. 131: "Whether growing crops are realty or personalty depends largely on the nature of the transaction giving rise to the question.

In some cases they may be realty while in others they are considered personalty. At common law growing crops raised annually by labor and cultivation are personal property, and may be sold and transferred as chattels, by parol. By the great weight of authority, this rule applies to annual crops owing their existence to the cultivation by man, even while such crops are annexed to the soil. But at common law, grasses growing from perennial roots are regarded as *fructus naturales,* and while unsevered from the soil, are considered as pertaining to the realty." 8 R. C. L., p. 356.

"The tenant is entitled to the possession of the lands and of the crop while it is being cultivated, and may maintain, in his own name, an action for any injury thereto, and for this purpose he is the 'real party in interest' within the spirit and meaning of section 177 of The Code (C. S., 446)." *Bridgers v. Dill,* 97 N. C., p. 227.

In *Brittain v. McKay,* 23 N. C., at p. 268, this Court said: "But the law makes a pointed distinction, between those profits which are the spontaneous products of the earth or its permanent fruits, and the corn and other growth of the earth which are produced annually by labor and industry, and thence are called *fructus industriales.* The latter for most purposes are regarded as personal chattels."

In *Lewis v. McNatt,* 65 N. C., at p. 65, it is held: "Crude turpentine which has formed on the body of the tree, and is usually known as 'scrape,' is personal property, and belongs to the person who has lawfully produced it by cultivation. *S. v. Moore,* 11 Ire., 70. It is an annual product of labor and industry, and although it adheres to the body of the tree it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales,* for it is not the spontaneous product of the trees, but requires annual labor and cultivation. Upon a similar principle, hops which spring from old roots have long been regarded as emblements. . . . *Brittain v. McKay,* 1 Ire., 265."

In *Smithwick v. Ellison,* 24 N. C., p. 326, it is held: "A tenant, who is about to remove, has a right, where there is no covenant nor custom to the contrary, to all the manure made by him on the farm; it is his personal property and he may take it with him. But the manure ceases to be his, if he leaves it when he quits the farm. Taking up with the manure the slight portion of the earth, which is necessarily mixed with it in raking it into heaps, will not make the tenant a *tort-feasor.*" *Sanders v. Ellington,* 77 N. C., 255, 257.

The evidence is sufficient to be submitted to the jury as to the negligent burning.

If the landlord in the lease had agreed that plaintiff could cut and remove and sell the broom straw, it would be another matter, but there is no evidence in the record to that effect.

Plaintiff's damages, on the present record, should have been confined to whatever loss, if any, he sustained as lessee of the premises—the value of the broom straw for farming purposes on the leased premises. For the reasons given, there must be a

New trial.

W. J. MIDDLETON v. O. C. HUNTER.

(Filed 4 April, 1928.)

Evidence—Competency—Evidence at Former Trial—Bills and Notes—Payment.

Plaintiff brought an action to recover upon a negotiable note purchased by him from one of a partnership. Thereafter, the partnership brings suit against the present plaintiff and the plaintiff sets up a counterclaim and sets forth certain notes and credits on the notes, but omits to set up any claim for the note in controversy in this action, and years after sues the original maker, who pleads payment. The former suit with other facts and circumstances was some evidence to be submitted to the jury, and the exclusion by the trial judge is reversible error.

APPEAL by defendant from *Cranmer, J.*, and a jury, at August Term, 1927, of DUPLIN. New trial.

The plaintiff alleges: That defendant, O. C. Hunter, executed and delivered to S. V. Stevens & Co., his promissory note under seal, dated 1 December, 1921, for $1,184.56, due at 90 days. That he, plaintiff, purchased the said note for value and before maturity and is now the holder of the same in due course. That the same is due and owing plaintiff.

The defendant denies that the plaintiff is the holder in due course, and alleges that he paid to S. V. Stevens & Co., to whom he made the note, all or practically all that was due on the note and after the maturity of same. The present action was brought 26 May, 1926.

The plaintiff testified, in part: That the firm of S. V. Stevens & Co., was composed of S. V. Stevens and W. H. McElwee, and he purchased the note on 6 December, 1921. It is endorsed S. V. Stevens & Co., by W. H. McElwee. That demand was made on defendant the day it was due through the First National Bank of Warsaw. (The Bank of Warsaw forwarded the note to the Jonesboro Bank for collection.) On cross-examination, in part: "had had lots of dealings and transactions with him (McElwee). My first dealings with him were in the latter part of 1918 or 1919. I considered him solvent at that time. I considered him reliable, and I absolutely accepted what he said about it. Since then he has become insolvent, and gone through bankruptcy. He was indebted to me in a large amount at that time. He is now indebted to me. I have sued him once. He has sued me. I have never been to see Mr. Hunter about this note. I have never written to him about it. I have never notified Mr. Hunter personally about this note. I never saw him before. I have never spoken to him about it. I have never spoken to him in my life. I got the note on 6 December, 1921. This is the summons in the case. Q. McElwee and Stevens brought suit against you in Pender County? (Objection by plaintiff, sustained; defendant excepted.) Witness, if allowed to answer, would have said Yes. Q. I ask you in the suit brought by Stevens & Company, if you did not file an answer setting up all the indebtedness due you by S. V. Stevens and W. H. McElwee at that time? (Objection by plaintiff, sustained; defendant excepted.) The court ruled that the objection is sustained unless this note is a part of it. The witness, if allowed to answer, would have stated: If the record shows that, I did. If it does not, I didn't. I don't remember about those things. Q. You filed an answer in that case? (Objection by plaintiff, sustained; defendant excepted.) Witness, if allowed to answer, would have said Yes. Q. Look at that paper and see if that is the answer you filed in that case? (Objection by plaintiff, sustained; defendant excepted.) Witness, if allowed to answer, would have said, if I signed it, it is. It is my signature if I signed it."

The defendant, Hunter, testified, in part: That he paid S. V. Stevens and S. V. Stevens & Co., in lumber and checks practically the entire debt. He was never notified that the note was transferred to plaintiff and plaintiff made no demand, and the first time he heard of it was when he was sued. That at the time the Bank of Jonesboro had the note at maturity W. J. Middleton's name was not on it. S. V. Stevens corroborated Hunter. He stated that he did not know that McElwee had transferred the note to plaintiff until Hunter told him he was sued.

Defendant introduced complaint and answer in action: "State of North Carolina, Pender County, in the Superior Court, W. H. McElwee and S. V. Stevens, trading and doing business under the firm name and style of Stevens & Company, against W. J. Middleton and wife, Hattie Middleton, and First National Bank of Warsaw, N. C.—Complaint." Answer signed by W. J. Middleton was sworn to 24 March, 1923. The defendant's answer, for a further defense and counterclaim, says: "1. That on 6 January, 1921, the plaintiffs, trading as Stevens and Company, made, executed and delivered to the defendant, W. J. Middleton, their two several promissory notes, each endorsed by the said W. H. McElwee and S. V. Stevens, each in the sum of $5,657.48, with interest from date at six per cent per annum, one of said notes due ten months after date, and the other due one year after date, and the said plaintiffs did thereby promise to pay to said W. J. Middleton for value received the sum of eleven thousand three hundred fourteen and 96/100 dollars, with interest on same from 6 January, 1921, at six per cent. 2. That no part of same was paid, except the following amounts credited on the first note, to wit: 30 March, 1922, $255.77; 15 May, 1922, $800.00; 28 June, 1922, $500.00; 6 October, 1922, $475.00, and both of said notes, subject to said credits, together with interest on same are now due and owing to the said defendant, W. J. Middleton, by the plaintiffs."

The complaint and answer was objected to by plaintiff, the objection sustained and defendant excepted. There are numerous other exceptions in the record not necessary for us to consider. The assignments of error were duly made by defendant.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the plaintiff, W. J. Middleton, the owner of the note sued on in due course? Answer: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: Face value of note with interest at six per cent from maturity."

Beasley & Stevens for plaintiff.
Gavin & Teague and Hoyle & Hoyle for defendant.

CLARKSON, J. We think the court below was in error in excluding the evidence objected to. It was competent to be submitted to the jury on the issue as to whether the plaintiff was the owner of the note sued on in due course.

It is well settled that admissions in pleadings are competent evidence. Even admissions of attorneys of record. Although the admissions are in another action, they are declarations of the party. *Morris v. Bogue Corporation,* 194 N. C., p. 279, and cases cited. The probative force is for the jury. For the reasons given, there must be a

New trial.

DURHAM CITIZENS HOTEL CORPORATION v. W. K. DENNIS AND J. E. UZZLE, TRADING AS W. K. DENNIS ROOFING AND MANUFACTURING COMPANY.

(Filed 4 April, 1928.)

Corporations—Incorporation and Organization—Right to Sell Stock in Prospective Corporation—Statutes.

Notes given for the purchase of shares of stock in a corporation being organized are not void for noncompliance with the provisions of C. S., 6363, 6367, when the shares were not put upon the market by agents, or commissions paid to anyone for procuring subscriptions thereto. *Hotel Corporation v. Bell,* 192 N. C., 620, cited and distinguished.

APPEAL by plaintiff from *Barnhill, J.,* at September Term, 1927, of DURHAM. Reversed.

Action to recover upon note alleged to have been executed by defendants. The consideration for said note is the purchase price of shares of stock of plaintiff corporation, alleged to have been subscribed for by defendants prior to the organization of plaintiff corporation. Defendants deny that they subscribed for said shares of stock, or that they executed the note sued on.

Plaintiff was not licensed, in accordance with the provisions of C. S., 6363, at the date of said subscription agreement and note, to sell its stock. Neither the said note nor the said subscription agreement complies with the requirements of C. S., 6367.

The court was of opinion that upon all the evidence, both said statutes are applicable in this action, and that, therefore, plaintiff is not entitled to recover upon the note. In accordance with said opinion, defendants' motion for judgment as of nonsuit, at the close of all the evidence, was allowed.

From judgment dismissing the action, as upon nonsuit, plaintiff appealed to the Supreme Court.

J. L. Morehead for plaintiff.
William B. Guthrie for defendants.

CONNOR, J. This case is readily distinguishable from *Hotel Corporation v. Bell,* 192 N. C., 620.

That case was heard in the court below upon a statement of facts agreed. The plaintiff had entered into a contract with the Hockenberry System, Inc., relative to the procurement of subscriptions for its stock. We said: "While it may be doubted whether the contract between the Burlington Hotel Corporation and the Hockenberry System, Inc., as set out in the statement of agreed facts, constituted the Hockenberry System, Inc., the agent of the plaintiff, for the sale of its stock, the parties hereto have agreed that the said Hockenberry System, Inc., was employed to sell stock, and received a commission for the sale of stock to the defendant." We, therefore, held that C. S., 6363, and C. S., 6367, were applicable to the transaction set out in the record and to the subscription agreement upon which plaintiff sought to recover in that action. Neither the plaintiff nor the Hockenberry System, Inc., had been licensed to sell stock of plaintiff corporation, as required by C. S., 6363. The subscription agreement signed by defendant did not comply with the requirements of C. S., 6367. The judgment that plaintiff was not entitled to recover of the defendant in that action was therefore affirmed.

In the instant case, plaintiff had not procured license to sell stock as required by C. S., 6363. Nor does the note sued upon, or the subscription agreement for the stock, alleged to have been signed by defendants, comply with the requirements of C. S., 6367. However, upon the uncontradicted evidence, plaintiff did not put its stock on the market for sale by agents, nor were commissions paid to anyone for procuring the stock subscription from defendants, or from others. We are, therefore, of the opinion that neither C. S., 6363, nor C. S., 6367, is applicable to the note upon which plaintiff seeks to recover in this action.

For error in holding that said statutes are applicable in this action, and in the judgment dismissing the action, the judgment must be reversed. Attention is directed, in this connection to chapter 149, Public Laws 1927, sec. 4, subsec. 7, by the provisions of which transactions such as that out of which this action arises are exempt from the requirements of the "Capital Issues Law. C. S., 6363, and C. S., 6367, as amended by subsequent statutes are expressly repealed by section 26, subsec. (e) of chapter 149, Public Laws, 1927.

This action is remanded to the Superior Court of Durham County in order that the issues involving other defenses to plaintiff's recovery may be tried and determined.

Reversed.

KATE McLEOD v. FRANK McNEILL ET AL.

(Filed 4 April, 1928.)

Curtesy—Releasing Right Thereto—Validity—Power of Wife to Convey Clear Title.

Where a contract of separation has been made by husband and wife after the occurrence of the separation, in which the former gives the latter a quitclaim deed to his inchoate right of curtesy, a deed to the land from the wife to another passes the title free from the claim of curtesy therein by the husband.

APPEAL by defendants from *Bond, J.*, at November Term, 1927, of ROBESON.

Controversy without action, submitted on an agreed statement of facts, to determine sufficiency of plaintiff's deed to convey clear title to lot of land.

Plaintiff, being under contract to convey a certain lot in the town of Lumberton to the defendants, duly executed and tendered a deed therefor and demanded payment of the purchase price as agreed, but the defendants declined to accept the deed and refused to make payment, claiming that the title offered is defective, in that they say it is not free and clear of the inchoate curtesy rights of plaintiff's husband.

On the facts agreed, the court, being of opinion that the title offered was one free and clear from any curtesy rights of plaintiff's husband, gave judgment accordingly, from which the defendants appeal, assigning error.

Johnson, Johnson & Floyd for plaintiff.
T. A. McNeill for defendants.

Stacy, C. J. The parties to the present proceeding, having a question in difference which might properly become the subject of a civil action, have submitted the same for determination without action, upon an agreed statement of facts, as authorized by C. S., 626.

The question to be determined is whether a separation agreement, duly executed between a husband and wife, long after separation and not in contemplation thereof, in which the husband "releases all the right, title and interest he may have, if any, as tenant by the curtesy, or otherwise, in the property of his wife," enables the wife to convey her property, thus released, without the written assent of her husband, the same as if she were unmarried?

The trial court was of opinion, and so held, that under the decisions and principles announced in *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25, and *Archbell v. Archbell,* 158 N. C., 409, 74 S. E., 327, the deed tendered by plaintiff is sufficient in form to convey said lot to the defendants free from any claim of plaintiff's husband arising out of the marriage relationship. In this, we find no error.

The separation agreement was made long after the parties separated; it is supported by adequate reasons and shows upon its face that it is beneficial, just and fair to the plaintiff. Its purpose, as appears from the instrument itself, is as follows:

"It is understood that the execution and delivery of this instrument and the acceptance and registration of the same shall not be construed as an admission on the part of the party of the second part (wife) that the party of the first part (husband) has any legal interest in and to the lands hereinbefore described, but the purpose and intent of the same is to quitclaim any right, title or interest in the property by the party of the first part, so that the party of the second part may mortgage, sell or otherwise dispose of said property, freed and discharged from any claim or demand, present or prospective, as tenant by the curtesy or otherwise, on the part of the party of the first part."

The judgment is fully supported by the record; it will be upheld.

Affirmed.

ATLANTIC LIFE INSURANCE COMPANY v. STACEY W. WADE, INSURANCE COMMISSIONER, AND B. R. LACY, TREASURER.

(Filed 4 April, 1928.)

1. **Statutes—Repeal and Revival—Repeal by Implication Not Favored.**
   The law does not favor the repeal by implication of one statute by another, but seeks to reconcile them if this can be done by a reasonable interpretation.

2. **Same—General Statute Does Not Repeal a Special One.**
   A statute enacted to obtain revenue for the State government is a public law, and when a section of the Consolidated Statutes provides for a retaliatory tax to be imposed on foreign insurance companies, a later general statute will not be held to repeal it under a general repealing clause, when the section of the Consolidated Statutes is not specially referred to, and the intent of the Legislature to the contrary is shown by statutes amending the section which is claimed to have been repealed. C. S., 6413.

CIVIL ACTION before *Cranmer, J.*, at January Term, 1928, of WAKE.

This was a controversy without action to determine the validity of taxes assessed by the Insurance Commissioner against the plaintiff. The excess tax claimed by plaintiff is $1,420.83 with interest, and this suit was instituted to recover such excess. Judgment was rendered against the plaintiff and in favor of defendants, from which judgment plaintiff appealed.

Albert L. Cox and A. L. Purrington, Jr., for plaintiff.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for defendants.

BROGDEN, J. The plaintiff Atlantic Fire Insurance Co., is a Virginia corporation duly engaged in the life insurance business in North Carolina. During the years 1925 and 1926, plaintiff has paid under protest taxes in the sum of $1,420.83 in excess of the amount charged and collected by the State of Virginia upon North Carolina insurance companies doing business in that State, of identical nature and character, and the question at issue involves an interpretation of C. S., 6413. This statute in substance provides that the same "licenses, fees, deposits, obligations and prohibitions, of whatever kind" shall be imposed upon insurance companies of other states doing business in this State as such other state shall impose upon insurance companies of this State doing business in such other state. It appears from the record that the amount claimed by the plaintiff is correct if C. S., 6413, was in force at the time the taxes were collected. The defendants contend that C. S., 6413 was repealed by the Revenue Act of 1923, same being chapter 4, Public Laws 1923, and the Revenue Act of 1925, same being chapter 101, Public Laws 1925. Section 903, chapter 4, Public Laws 1923, provides: "All laws imposing taxes, the subjects of which are revised in this act are hereby repealed," etc. Section 903, chapter 101, Public Laws 1925, provides: "This act, after its ratification, shall constitute authority for the imposition of taxes upon the subjects herein revised, and all laws in conflict with it are hereby repealed," etc.

It is to be observed at the outset that these revenue acts are general laws and do not attempt to expressly repeal C. S., 6413. If these revenue acts repeal C. S., 6413, such repeal is by implication. "As a general rule the law does not favor implied repeals. A statute may be repealed by implication and without any express words, but the leaning of the courts is against the doctrine if it is possible to reconcile the several acts." *Litchfield v. Roper,* 192 N. C., 202; *S. v. Johnson,* 170 N. C., 685; *Blair v. Comrs.,* 187 N. C., 488. C. S., 6413, is made up of section 71, chapter 54, Public Laws 1899, and section 11, chapter 536, Public Laws 1903. The section was brought forward in the Consolidated Statutes and was therefore considered by the Legislature as live and existing law upon the subject. Doubtless all revenue acts since 1903, have contained repealing clauses similar to those contained in the acts of 1923 and 1925, and yet C. S., 6413, has been recognized by the Legislature as still in force. This legislative recognition has been established beyond question by chapter 32, Public Laws 1927, which in express terms amends section 6413 in the manner therein pointed out, and which amendment now constitutes C. S., 6413, a retaliatory law pure and simple. As the taxes in controversy were collected prior to the amendment of chapter 32, Public Laws 1927, we are of the opinion and so hold that 6413 applied to the taxes in controversy and the plaintiff is entitled to recover.

Reversed.

STATE v. J. E. GILL.

(Filed 4 April, 1928.)

1. Criminal Law—Violation of City Ordinance—Burden of Proving Existence of Ordinance.

Where the defendant is charged with violating a city ordinance it must be shown for conviction that the ordinance had been duly passed or enacted by the governing body of the town, and was in existence at the time in question.

2. Same—Prima Facie Case.

On appeal from the mayor's court convicting the defendant of violating an ordinance of the town, the certificate of the mayor of the existence of the ordinance at the time makes out a prima facie case of its existence under the provisions of our statute, C. S., 1750.

3. Same—Evidence Sufficient to Rebut—Question for Jury.

When the defendant, convicted of the violation of a city ordinance, on appeal introduces in evidence the minutes of the meeting of the governing authorities of the town, which does not show its passage on a certain date, it is not conclusive that the ordinance had not been passed, at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction, and the question is determined by the verdict of the jury.

CRIMINAL ACTION before *Sinclair, J.*, at September Term, 1927, of WAKE.

The defendant was tried in recorder's court in the town of Zebulon for violation of "Miscellaneous Preventive Ordinance No. 15" for that the defendant did not display auto tags of the town of Zebulon as required by said ordinance. The defendant appealed from the judgment of recorder's court to the Superior Court of Wake County and was again convicted. He appealed, assigning error.

H. L. Swain for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for State.

BROGDEN, J. The State offered in evidence a certified copy of the ordinance in controversy, the certificate being as follows: "C. M. Kavanough, being first duly sworn, deposes and says: That he is the mayor of the town of Zebulon; that the above is true copy of an ordinance of the town of Zebulon, the same being under the head of 'Miscellaneous Preventive Ordinances' is section 15 thereof; that said ordinance was in force at the time of the alleged violation of the same by J. E. Gill; that the same has been in force since 7 June, 1926." The defendant contended that the ordinance had not been properly enacted by the commissioners of the town of Zebulon and offered the minutes of the meeting of the board of commissioners of the town of Zebulon, held on 7 June, 1927, which was the date when the purported ordinances appeared to have been adopted. The minutes of said meeting failed to disclose any reference whatever to the ordinance. C. S., 1750, provides: "In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance." The affidavit of the mayor states that the ordinance had been in force since 7 June, 1926. Does the fact that the minutes of the meeting of the board of commissioners on 7 June, 1926, do not disclose any reference to said ordinance or the adoption thereof, rebut the prima facie evidence of the existence of the ordinance created by C. S., 1750? *Adams, J.,* in *White v. Hines,* 182 N. C., 275, said: "A prima facie case or evidence is that which is received or continues until the contrary is shown. It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose." However, "a prima facie case, or prima facie evidence, does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. The opposing party, however, is not required as a matter of law to offer evidence in reply. He may take the risk of an adverse verdict if he fail to do so. The case is carried to the jury on a prima facie showing and it is for them to say whether or not the crucial and necessary facts have been established." *Stacy, J.,* in *Speas v. Bank,* 188 N. C., 524.

A valid ordinance must be duly passed or enacted by the governing body when such governing body is acting in its official capacity. The minutes of the meeting of 7 June, 1926, fail to show the adoption of the ordinance on that particular date, but the minutes of that particular meeting are not conclusive upon the question "of the existence of such ordinance" as specified by C. S., 1750. The determination of this question was the function of the jury. We therefore conclude that the judgment is correct. *S. v. Abernethy,* 190 N. C., 768.

No error.

JOE W. MARTIN AND WIFE, SALLIE JANE MARTIN, v. O. H. KNOWLES.

(Filed 4 April, 1928.)

1. **Deeds and Conveyances — Construction and Operation — Estates and Interests Created—Rule in Shelley's Case.**

Where the description of the grantees in a deed is to L. and her children, and the granting clause and the other relevant parts of the deed conveys to L. a life estate in the lands, and then "to her heirs, executors, administrators and assigns": *Held,* L. takes a fee-simple estate under the rule in *Shelley's case,* the word "children" in the preliminary designation being regarded as an inadvertence.

2. **Same—When Rule in Shelley's Case Applies.**

The rule in *Shelley's case* applies when, and only when, there is an estate of freehold granted to A. with a limitation over, either mediately or immediately, in fee or in tail, to the heirs of A.

3. Same.

As to whether a limitation over is to heirs *qua* heirs is a preliminary question to be decided by general rules of construction, and is determinative of the applicability of the rule.

4. Same—Rule of Law.

The rule in *Shelley's case* is a rule of law and not a rule of construction. See discussion of the rule by Mr. Hayes as given in the opinion of the Court.

APPEAL by defendant from *Nunn, J.*, at January Term, 1928, of WAYNE.

Controversy without action, submitted on an agreed statement of facts, to determine the title to a tract of land.

Plaintiffs, being under contract to convey to the defendant a certain tract of land situate near the town of Mount Olive, Wayne County, duly executed and tendered a deed therefor, and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed and refused to make payment, claiming that the title offered is defective.

Upon the facts agreed, the court, being of opinion that the plaintiffs were able to convey a good and sufficient title, gave judgment accordingly, from which the defendant appeals, assigning error.

D. H. Bland for plaintiffs.
Langston, Allen & Taylor for defendant.

STACY, C. J. Plaintiff, Sallie Jane Martin, derives title to the tract of land sought to be conveyed, the *locus in quo,* by deed from Albert D. Dail and wife, and, on the facts agreed, the title offered was properly made to depend upon the construction of said deed.

The parties are designated in the premises as "Albert D. Dail and his wife, Lucy W. Dail, parties of the first part, and Sallie Jane Martin and her children, parties of the second part." The granting clause and other parts of the deed are as follows: "Said parties of the first part, for and in consideration of ten dollars paid by the party of the second part, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do bargain, sell and convey unto said party of the second part a life estate therein, and then to her heirs, executors, administrators and assigns, a certain tract of land (description not in dispute).

"It is the purpose of this deed to convey the above tract of land to Sallie Jane Martin during her lifetime, then to her heirs in fee simple, forever.

"To have and to hold the aforesaid tract of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their heirs and assigns, to their only use and behoof."

The record is silent as to whether there were any children of Sallie Jane Martin *in esse* at the time of the making of this deed, or as to whether she has ever had any children. However, under the view we take of the conveyance, the facts in this respect, whatever they may be, are not deemed material.

Plaintiffs contend that under the foregoing deed, Sallie Jane Martin holds a fee-simple title to the tract of land sought to be conveyed; while the defendant contends that, under said deed, the plaintiff, Sallie Jane Martin, took only a life estate in the property thereby conveyed. It was agreed that judgment should be entered for plaintiffs, or for the defendant, according to the view the court should take as to the contentions of the parties with respect to the proper construction of this deed.

It is manifest, we think, viewing the instrument in its entirety, that, under the rule in *Shelley's case,* this deed conveys to Sallie Jane Martin a fee-simple estate to the land described therein. *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25; *Benton v. Baucom,* 192 N. C., 630, 135 S. E., 629; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501; *Crisp v. Biggs,* 176 N. C., 1, 96 S. E., 662; *Nichols v. Gladden,* 117 N. C., 497, 23 S. E., 459. The use of the word "children" in naming the party of the second part was evidently an inadvertence.

One of the clearest statements, if not the clearest exposition, of the rule in *Shelley's case,* to be found anywhere, appears in Vol. I Hayes's Conveyancing (5 ed.), 542-553, published in 1840 by William Hayes, Esq., eminent English barrister and author, from which we quote somewhat at length, as this work, if not out of print, is no longer readily obtainable on the market. The explanation ought to prove helpful to the profession, as well as to students of the subject.

Mr. Hayes says: "The rule in *Shelley's case* says, in substance, that if an estate of *freehold* be limited to A., with *remainder* to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A., the ancestor. An attempt will now be made to develop the leading principles of this rule, than which, when divested of all extraneous matter, no rule of law is more simple or certain.

"I. If the rule in question had *not* been adopted, land might have been limited for a particular estate of freehold (as to one in tail, for life, *pur auter vie,* etc.), with remainder to the heirs of the body, or heirs general, of the freeholder, which remainder, since *nemo est hæres viventis,* must have been *contingent* during his life, but, if not defeated by the determination, in his lifetime, of his particular estate, would have vested, on his death, in the person or persons then answering the description of his heir or coheirs special or general. Thus the law would have stood. If not, why was the rule instituted?

"II. The rule assumes and founds itself upon two preëxisting circumstances—a freehold in the ancestor, and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it. When the rule supposes the second limitation to be a remainder, it plainly excludes—1, the case of limitations differing in quality, the one being legal and the other equitable; 2, the case of limitations arising under distinct assurances; and, 3, the case of an *executory* limitation, by way of devise or use; and, consequently, upon *principle,* the case of a limitation arising under an appointment of the use;—but *authority* seems to have established an anomalous exception in regard to appointments. Again, as the second limitation must be a remainder to the heirs, it follows, that, with limitations to *sons, children,* or other objects, to take, either as individuals or as a class, under what is termed a *descriptio personæ,* as distinguished from a limitation embracing the line of inheritable succession, the rule has no concern whatever. In order to find whether the second limitation is a *remainder* to the *heirs* or not, we must resort to the general rules and principles of law. The rule being a maxim of legal policy, conversant with *things* and not with *words,* applies whenever judicial exposition determines that *heirs* are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term *heirs.* Thus, even the word *children,* aided by the context, or the word *issue,* uncontrolled by the context, may have all the force of the word *heirs,* and then the rule applies; while the word *heirs,* restrained by the context, may have only the force of the word *children,* and then the rule is utterly irrelevant. These are preliminary questions, purely of construction, to be considered without any reference to the rule, and to be solved by, exclusively, the ordinary process of interpretation. *This* point, kept steadily in view, would have prevented infinite confusion.

"III. The operation of the rule is two-fold: first, it denies to the remainder the effect of a gift to the *heirs;* secondly, it attributes to the remainder the effect of a gift to the *ancestor* himself. It is, therefore, clear that the rule not only defeats the intention, *but substitutes a legal* *intendment directly opposed to the obvious design of the limitation.* A rule which *so* operates cannot be a rule of *construction.* As a consequence of transferring the benefit of the remainder from the heirs, who are unascertained, to the ancestor, who is ascertained, the inheritance, limited in contingency to the heirs, *may* become *vested* in the ancestor; and, as another consequence of the same process, the ancestor's estate of freehold *may* merge in the inheritance. Thus—1. If land be limited to A. for life, remainder to his heirs or to the heirs of his body, the primary effect will be to give him an estate of freehold (liable, of course, to merger), with, by force of the rule, a remainder immediate and vested, to himself in fee or in tail (just as if the limitations were to him for life, remainder to *him and* his heirs, or to *him and* the heirs of his body); and the final result, under the law of merger, will be, by the absorption of the particular freehold in the vested inheritance, to give him an estate in fee tail or an estate in fee simple in possession. But—2. If land be limited to A. for life, remainder, *if A. shall survive B.,* to his (A.'s) heirs or to the heirs of his body, then, as the remainder is contingent, because made to depend on A.'s surviving B., the ancestor (A.) will take, under the rule, not a vested, but a *contingent* inheritance (just as if the limitations were to him for life, remainder, if, etc., to *him and* his heirs, or to *him and* the heirs of his body), the rule changing the *object* but not the *quality* of the remainder. Here, as the inheritance cannot vest, the particular estate of freehold will not merge, but A. will remain tenant for life, with an immediate *contingent* remainder to himself in tail or in fee. This remainder, in the event of his surviving B., will *vest* in him (A.); the estate of freehold will *then* merge, and he will thus have, as in the previous example, a fee tail or fee simple in possession. So—3. If land be limited to A. for life, remainder to B. for life or in tail, remainder to the heir or heirs of the body of A., then, by reason of the interposition of the estate for life or estate tail of B., the ancestor (A.) has, under the rule, not an immediate, but only a *mediate* inheritance (just as if the limitations were to him for life, remainder to B. for life or in tail, remainder to *him* (A.) *and* his heirs, or to *him and* the heirs of his body), the rule changing the *object,* but not the *position,* of the remainder. A., therefore, will be tenant for life, with a mesne *vested* remainder to himself in tail or in fee, in which remainder, if B.'s interposed estate should determine in A.'s lifetime, A.'s life estate will merge, and he will then have, as in the first example, a fee tail or fee simple in possession.

"The obvious deduction from these examples is, that in no case does the *rule* disturb the particular estate of freehold in the ancestor, which estate is left to the uncontrolled operation of ordinary principles, merging, or not merging, according as the remainder, transferred by the rule from the heirs to the ancestor, is absolute or conditional, proximate or remote. The estate of freehold is a *circumstance* without which the rule is dormant; but the rule, when called into action, exerts its force *on the remainder alone.* Why *that* circumstance was selected, we can only conjecture. It is affirmed, indeed, that a limitation to A. for *life,* with *remainder* to his heirs, is in truth the same thing as a limitation to *A. and his heirs.* In the simple case thus put, the effect, under the *rule,* aided by the doctrine of *merger,* is the same, but surely the import is not the same. And how unsatisfactory does this reasoning appear, when it is recollected that the rule equally applies where the gift is to A. for life, remainder (interposed) to B. for life, remainder to the heirs of A.; or to A. *pur auter vie,* remainder to the heirs of A.; or, to A. *durante viduitate,* remainder to the heirs of A.; or to A. in tail, remainder to the heirs of A. etc.—cases which need only be mentioned in order to destroy the theory that would form a fee by the *union* of the two limitations. It is an error, and the fruitful parent of errors, to affirm that the limitations unite or coalesce under the *rule,* which has discharged *its* office by simply substituting the ancestor for the heirs in the second limitation.

"IV. When the ordinary rules of construction have ascertained the coexistence of a freehold in the ancestor with a remainder to the heirs, the simplest and surest method of applying the rule is to read the second limitation as a limitation to the *ancestor himself and* his heirs. This gives at once, and in every possible case, the true result. The effect, universally and constantly, will be the same as if the remainder had been expressly and intentionally limited to the ancestor and his heirs: reading the words 'and his heirs,' not (according to the notion referred to at the close of the preceding paragraph), as words of limitation of the estate of freehold before expressly *limited* to him, but as words of limitation of the estate in remainder *attributed to him by the rule.*

"These positions, which really comprise the whole doctrine of the *rule,* appear in themselves to be clear and demonstrable. But text-writers seem to have perplexed this branch of learning by insisting, at one time, that, upon *general principles,* the law would not allow of a remainder to the heirs, as purchasers, of an ancestor taking a particular estate of freehold, or, in other words, that there is no special interdict at all—a summary mode of ending the discussion, by annihilating the very subject of it; at another, that the rule is a key to the construction, nay, consults the *intention* of the limitations; again, that where the remainder is immediate, the limitations *unite* or coalesce, or, with equal inaccuracy, that the estate of the ancestor is *enlarged* into an estate tail, and that where the remainder is mediate they unite or coalesce *sub modo,* so as to admit the intervening estates, or, in other words, that they are at once united and distinct, at once consolidated and unconfounded.

"The rule, when viewed in its true light, as a rule which refuses to one (and only one) given mode of disposition the intended effect, and arbitrarily imposes a different effect, ceases to present that mysterious aspect with which acute and laborious, but, in this instance, apparently misdirected learning has invested it. Its reason may be lost, its policy may be questioned, but its authority must be acknowledged; while its application is relieved from every difficulty. No longer the sport of conflicting opinions or decisions, it has a determinate purpose and a uniform result.

"The propriety of abolishing the rule has been suggested; but as it does not interfere with the construction of words, none of the questions arising upon devises to *heirs* and *issue* would be prevented by its abolition. It affixes no technical sense to *heirs* or *issue,* but when, by the common rules of interpretation, there is found to be a gift for life, remainder to the heirs, then, and not till then, the rule steps in, and gives the remainder to the ancestor, to the disappointment of the whole scheme of the limitations. If there had been no such rule, the intention would have been completely effected by permitting the *heirs* to take the remainder originally in their own right, with a capacity of transmission to all the heirs of the body of the ancestor. It is against *this* mode of taking, and this mode of taking *alone,* that the rule is directed. If these simple principles had been kept in view, the great case of *Perrin v. Blake,* which was contested so many years (1 Harg. Coll. Jur. 283), could not have divided for an instant the opinions of the bench. The only result of abolishing the rule would be to make the first taker tenant for life, with a contingent remainder to his *heirs,* not to his *children.* If the limitations were of the *legal* estate, the contingent remainder might be destroyed. As the remainder would have no ascertained object till the death of the ancestor, the family arrangements which, when estates are entailed according to the usual course of strict settlements, so frequently succeed the majority of an eldest son, would be impracticable. We are too apt to be struck by the effect of the rule in giving the inheritance to the first taker, without considering what would be its destination in the absence of the rule."

It follows from what is said above that the judgment rendered in the Superior Court is correct, and it is accordingly approved.

Affirmed.

DUNCAN CAMERON WADDELL, JR., TRUSTEE, ETC., v. UNITED CIGAR STORES OF AMERICA.

(Filed 4 April, 1928.)

Trusts—Management and Disposal of Trust Property—Right to Lease—Contingent Interests—Persons Not in Esse—Representation.

Where the trustee under a will is given full authority to lease a certain store, the property of the testator left in trust to pay first a certain part of the rental to a designated beneficiary in certain semiannual payments, to be made therefrom for life, the remainder of the rent to certain other beneficiaries, and then provides for a series of contingencies relating to the death and survival of such beneficiaries, with the final vesting of the title of the building upon a further contingency, a judgment of the court in which all contingent interests are properly represented, both as to those *in esse* and those not *in esse*, all having the same interest, authorizing a lease for thirty years to be made by the executor and trustees under the will, which lease, under the table of expectancy, C. S., 1790, of the beneficiaries, would terminate before the trust, and would not interfere with the final devolution of the property according to the will, is valid and binding, and objection thereto on the ground that the lease may extend beyond the term of the trust is untenable. C. S., 1744, 1745.

APPEAL by defendant from *Moore, J.*, at January Term, 1928, of BUNCOMBE.

Leila Johnston Waddell died 1 December, 1924, leaving a last will and testament which was duly admitted to probate in Buncombe County. She appointed her husband, Duncan Cameron Waddell, her sole executor and trustee and gave him full power and authority to perform all duties devolving upon him and provided that if he should not qualify or if he should die before the administration of her estate is completed the Wachovia Bank & Trust Company should become her executor and trustee with the same powers that were conferred upon her husband. The three items following are material to the controversy:

"Item 5. I give and bequeath to Gabrielle DeRossett Waddell, of Wilmington, North Carolina, an annuity of $1,000, for and during her natural life, and I direct my executor and trustee to pay semiannually to said Gabrielle DeRossett Waddell said amount from the income derived from the Paragon Building, located at the corner of Patton Avenue and Haywood Street, in the city of Asheville, North Carolina, hereinafter particularly referred to, so long as she may live, and I do hereby make said annuity a first charge on the income derived from said property.

Item 6. I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, to my husband, Duncan Cameron Waddell, in fee, except that certain property in the city of Asheville, at the corner of Patton Avenue and Haywood Street, known as the Paragon Building, and specifically mentioned hereinafter in my said will, and I devise and bequeath said Paragon Building property to said Duncan Cameron Waddell, in trust, to handle, manage, control and improve in such way as to him may seem desirable, and to collect all income therefrom and out of said income he shall pay to Gabrielle DeRossett Waddell the annuity herein given in Item V hereof, and all the income derived from said property, not required to pay said annuity, shall be and become the personal property of the said Duncan Cameron Waddell.

Item 7. After the death of my husband, Duncan Cameron Waddell, I devise and bequeath said Paragon Building property aforesaid, situate at the corner of Patton Avenue and Haywood Street, in the city of Asheville, to the Wachovia Bank & Trust Company, of Winston-Salem, North Carolina, in trust, to be by it held, managed and controlled for the joint interest and benefit of Robert Bruce Johnston and William Johnston, sons of William Johnston of Asheville, North Carolina, subject, however, to the annuity charge mentioned in Item V for the benefit of Gabrielle DeRossett Waddell. I direct said trustee, after the payment of said annuity, to pay the net income derived from said property, equally and semiannually, to the guardian or guardians of the said Robert Bruce Johnston and William Johnston until they become of age, and thereafter pay it to them semiannually, share and share alike, for and during their natural lives. In the event of the death of one of them before the other, then said net income shall be paid to the survivor, at the times heretofore directed, unless the one dying shall leave children surviving him, in which event his part of said net income shall be paid, as heretofore directed, to the guardian of his child or children, share and share alike, until he, she or they, shall reach the age of 21 years, and then to him, her or them during the existence of the trust herein created. Said trust shall terminate upon the death of both said Robert Bruce Johnston and William Johnston, and then said trustee shall turn over and deliver to the child or children of each of them surviving, *per stirpes,* if there be any, or the children of the survivor, if there be any, said property, and make and execute any and all necessary instruments or writings required to invest him, her or them with full and complete title to said property. If, however, said Robert Bruce Johnston and William Johnston shall die leaving no child or children surviving, said trustee, aforesaid, shall turn over and deliver and make and execute all instruments or writings required to invest the Diocese of Western North Carolina of the Protestant Episcopal Church of the United States of America, with complete title to said property."

The parties hereto entered into an agreement, the form of which is satisfactory to them, by which the plaintiff is to lease the Paragon Building to the defendant for a term of thirty years from 1 January, 1928, at an agreed rental price; and for the purpose of obtaining legal authority to execute the lease the plaintiff prosecuted a civil action in the Superior Court of Buncombe County entitled "Duncan Cameron Waddell, Trustee, v. Wachovia Bank & Trust Company, et al," the judgment roll of which is made a part of the record. The defendants in that action were the Wachovia Bank & Trust Company, the Diocese of Western North Carolina of the Episcopal Church of the United States of America, Robert Bruce Johnston and William Johnston, their guardian, Sarah W. Johnston, "and all persons not *in esse.*" The present defendant was not a party. In that case the plaintiff's allegations were admitted by all the defendants and Judge Schenck upon facts found and set out in the judgment adjudged that the plaintiff has power and authority to execute the lease; but when it was executed and tendered the defendant refused to accept it for the alleged reason that the Superior Court did not have any jurisdiction, either statutory or inherent, of the subject-matter thereof, or of the parties and purported parties thereto, including the remaindermen not yet *in esse,* and the said decree is not valid and binding upon all of the parties, purported parties and the remaindermen not yet *in esse.*

Judge Moore adjudged that the lease was valid and that the plaintiff is entitled to the rental price of the property accruing since 1 January, 1928. The defendant excepted and appealed.

Merrimon, Adams & Adams for plaintiff.
Geo. H. Wright for defendant.

ADAMS, J. This is a controversy without action submitted under Article 25 of the Consolidated Statutes to test the validity of a written instrument executed by the plaintiff and tendered to the defendant for the lease of a building situated at the corner of Patton Avenue and Haywood Street, in the city of Asheville, known as the Paragon Building. The house is a three-story brick structure which was erected twenty-five or thirty years ago—a barber shop in the basement; a bank and stores on the ground floor; on the second floor offices; and on the third a large hall. There is no elevator, and for this reason in part the rental value of the third floor is comparatively negligible. For the proposed lease, which is to continue for a term of thirty years from 1 January, 1928, the defendant agrees to pay $709,500—for the first seven years $1,875 monthly in advance, and $2,000 each month for the remaining twenty-three years. If the agreement is mutually executed the lessee will be obligated to keep the property in repair, to pay all such taxes and assessments as may be levied against it, to keep it insured, and to pay any damages which may be sustained.

The appellant raises the two questions whether, without reference to the judgment, the trustee is authorized by the sixth item of the will to make the contemplated lease, and, if not, whether such authority is conferred upon him by the judgment of the court. In regard to the first, the plaintiff says that the devise in trust "to handle, manage, control, and improve (the property) in such way as to him may seem desirable, and to collect all incomes therefrom" empowers him to execute the lease without the direction or permission of the court—a position not without the support of authority. 2 Perry on Trusts (6 ed.), secs. 484, 528, 608; 2 Thompson on Real Property, sec. 1094; *In re Upham,* 152 Wis., 275, 48 L. R. A. (N. S.), 1004, 1014; *Penn. Horticultural Society v. Craig,* 87 Atl., 678. On the other hand the point is made that trustees who are not given express authority to rent the trust property may not execute a lease for a term which is likely to extend beyond the trust period. *Hubbell v. Hubbell,* 13 L. R. A. (N. S.), 496, 503; *Gomez v. Gomez,* 31 N. Y. Sup., 206; *ibid.,* 41 N. E. 420; Note 14 Ann. Cas., 651; *South End Warehouse Co. v. Lavery,* 107 Pac., 1008; *Cox v. Lumber Co.,* 175 N. C., 299, 304. But this question is not necessarily presented: the testatrix provided that the trust should terminate upon the death of Robert Bruce Johnston and William Johnston, whose expectancy according to the mortuary tables is respectively 44.9 and 45.5 years, a period, in either event, considerably longer than that of the lease. C. S., 1790.

As the renting will not in any way alter or modify the ultimate devolution of the property, the Superior Court in the exercise of its equitable supervision had authority to make such order as it deemed beneficial if all interests were represented and the parties were properly within its jurisdiction. 26 R. C. L., 1301, sec. 154; *In re Upham, supra.* While there are decisions to the effect that a lease which is to extend beyond the termination of the trust is not binding on remaindermen who are not subject to legal process (2 Perry on Trusts, sec. 484 n.), the pivotal question is whether all the parties who are or may be affected with an interest in the property had actual or virtual representation at the hearing.

The testatrix devised the Paragon Building to her husband "to manage, control, and improve," but she provided that the trust should survive him; that after his death the property should be held by the Wachovia Bank & Trust Company for the joint interest and benefit of Robert Bruce Johnston and William Johnston. Subject to the annuity given Gabrielle DeRossett Waddell the income derived from the property must be paid by the trustee to the guardian of these two devisees until they arrive at the age of twenty-one years, and thereafter directly to themselves. If either die without children surviving him the net income shall be paid to the other; but if the deceased leave children his share shall be paid to their guardian until they attain their majority and thereafter to them share and share alike. Upon the death of Robert Bruce Johnston and William Johnston the trust shall come to an end and the property shall be delivered to the surviving child or children, *per stirpes;* and if no child survive them then to the diocese described in the will.

In *Ex parte Dodd,* 62 N. C., 98, this Court held that if land be devised to a person for life with remainder in fee to his children a sale of the land cannot be ordered before the birth of a child, because there is no one *in esse* to represent its interest; but if there be a living child in whom the fee can vest a sale may be ordered, though all the children of their class may not yet have been born. See *Miller ex parte,* 90 N. C., 625; *Irvin v. Clark,* 98 N. C., 437; *Springs v. Scott,* 132 N. C., 548; *Lumber Co. v. Herrington,* 183 N. C., 85; *Bank v. Alexander,* 188 N. C., 667. But the rule formerly prevailing has been modified by legislation. C. S., 1744, 1745. *Pendleton v. Williams,* 175 N. C., 248; *Poole v. Thompson,* 183 N. C., 588.

The statutes just cited apply, however, to a sale of property in which there are or have been contingent interests. In the case before us it is not proposed to convey the legal title, or, as we have said, to change the course of devolution, but to execute a lease which, except as modified by statute, is treated as a chattel real, falling within the classification of personal property. It is obvious that between a sale and a lease of real property there is a distinction which often calls for the application of diverse principles. We have referred to those controlling in case of a sale; but a lease authorized by the decree of a court of chancery may be binding upon beneficiaries not *in esse* when their interests are the same as those of persons in being who are subjected by due process to the jurisdiction of the court. 26 R. C. S., 1302, sec. 155. The principle is thus stated in *Denegre v. Walker,* 2 Ann. Cas. (Ill.), 787, 790: "It is further insisted that persons not yet *in esse* may, on the happening of certain contingencies, become interested in this estate, and that no decree can bind such persons. This contention is without merit. In the case of *Hale v. Hale, supra,* in discussing this question, we said (p. 259): 'Such possible parties cannot, as a matter of course, be brought before the court in person, and it would be highly inconvenient and unjust that the rights of all parties in being should be required to await the possible birth of new claimants until the possibility of such birth has become extinct. If persons in being are before the court who have the same interest and are equally certain to bring forward the entire merits of the question and thus give such interests effective protection, the dictates both of convenience and justice require that there should be a complete decree. . . . The rights of those *in esse* and those not *in esse* are protected by the decree in precisely the same way and to the same extent. . . . The decree, therefore, must be held to be valid as a conclusive disposition of the rights of all the beneficiaries, as well those not *in esse* as those who were made defendants to the bill by name.' So in this case, parties not *in esse* are protected the same as those before the court. Nor can we see how their interests could be diminished by the making of the lease."

The interest of Robert Bruce Johnston and William Johnston in seeing that the building is rented is identical with such interest as the contingent remaindermen might have. The living devisees may be regarded as certain "to bring forward the entire merits of the question" and to exercise diligence to protect all interests. It is found as a fact and set out in the judgment that the lease will benefit the trust estate and subserve the interest of the beneficiaries in being and in possibility, and as there is no provision that will interfere with the title or impair the interest or income of any of the contingent remaindermen we discover no sufficient reason for disturbing the judgment. Judgment

Affirmed.

J. C. BROADHURST, L. L. WALKER, L. H. PETERSON AND OTHERS, ON BEHALF OF THEMSELVES AND OTHERS WHO MAY COME IN AND MAKE THEMSELVES PARTIES PLAINTIFFS, v. BOARD OF COMMISSIONERS OF PENDER COUNTY DRAINAGE DISTRICT NO. 4, A. V. WILLS & SONS, A CORPORATION, AND EMMET S. WILLS.

(Filed 4 April, 1928.)

1. **Drainage Districts—Authority of Court to Appoint Receivers—Quasi-Municipal Corporations.**

A drainage district organized pursuant to chapter 442, Public Laws 1909, prior to the amendment of chapter 7, Public Laws 1921, is not a political subdivision of the governmental powers of the State of the same dignity as a county, or city, and where one of these districts has not conformed to the law in its formation, and is therefore void, the courts of the State have in proper instances the authority to preserve the property thereof and protect the rights of those in interest by the appointment of a receiver to the final hearing, without the aid of statute.

2. **Drainage Districts—Creation and Existence—Vested Rights—Statutes.**

The proceedings in forming a drainage district under the provisions of chapter 442, Public Laws 1909, is judicial and not administrative, and the amendment of chapter 7, Public Laws 1921, making all districts theretofore or thereafter created a political subdivision of the State cannot affect vested rights of landowners acquired under orders, judgments, or decrees made in pursuance of the powers conferred by the original act.

3. **Appeal and Error—Requisites and Proceedings for Appeal—Motions—Exceptions.**

   The question of whether the lower court was in error in issuing orders for the appointment of a receiver for a statutory drainage district arises on appeal to the Supreme Court upon exceptions duly taken, and objections to the regularity thereof as not being entered in the course and practice of the court must be by motion in the cause.

4. **Courts—Superior Courts—Power of Trial Judge to Hear Final Order of Another.**

   Where an order of the judge of the Superior Court is finally determinative of the rights of the parties, it may not be considered by another Superior Court judge upon motion to set it aside, such power existing only as to interlocutory orders.

APPEAL by plaintiffs from an order of *Devin, J.*, dated 12 December, 1927. From PENDER. Reversed.

This is an action begun in the Superior Court of Pender County by summons dated 13 December, 1923, for judgment (1) that the names of plaintiffs be stricken from the assessment rolls of Pender County Drainage District No. 4; (2) that certain bonds issued by the board of commissioners of said district and delivered to defendant, A. V. Wills & Sons, contractors, be declared null and void, and that said bonds be delivered up and canceled; (3) that the defendant, board of commissioners of said district be enjoined from making any levies or assessments upon the lands of plaintiffs, situate within the boundaries of said district; and (4) that the orders, decrees and judgments of the court, establishing said district be declared null and void.

On 20 May, 1927, pursuant to the prayer of an amended complaint filed by plaintiffs on 19 May, 1927, an order was entered in this action, enjoining and restraining defendant, board of commissioners of said district from exercising any of the functions of drainage commissioners, and appointing a temporary receiver, to take over and hold all the property held in the name of Pender County Drainage District No. 4. The defendants were therein ordered to show cause, if any they had, before his Honor, W. M. Bond, at Wilmington, N. C., on 9 June, 1927, why the receivership should not be made permanent, and why the injunction should not be continued to the final hearing. This order was duly served on defendants.

Thereafter, on 9 June, 1927, at Wilmington, N. C., pursuant to the foregoing order, the following order was signed by Judge Bond:

"This cause coming on to be heard before the undersigned judge holding the courts of the Eighth Judicial District, and being heard upon a rule to show cause why a permanent receiver should not be appointed for the Pender County Drainage District No. 4;

"It is ordered, considered and adjudged that L. J. Poisson be, and he is hereby, appointed permanent receiver of the Pender County Drainage District No. 4, and directed to collect any funds, moneys, property and assets of the said district and hold the same until the further orders of this court. The receiver is directed to defend all suits. All claims against the district shall be filed, duly verified, with the receiver, within ninety days from this date, and upon failure to file said claims they will be barred from participating in assets.

"The receiver will give notice of this order by mail to all known claimants, and will publish a notice of this order in a newspaper once a week for six weeks. The receiver will give bond in the sum of $1,000 with surety to be approved by the clerk."

Thereafter, on 12 December, 1927, at Wilmington, N. C., the following order signed by Judge Devin was entered in this action:

"This cause coming on to be heard upon motion to vacate the receivership and the restraining order heretofore issued in this cause, notice of which was made returnable at July Term, 1927, of Superior Court of New Hanover County, at Wilmington, N. C., and thereafter continued from time to time by consent of the parties, until December Term, 1927, of New Hanover Superior Court, and now coming on for hearing on this 12 December, 1927, at Wilmington, N. C., and being heard by consent, and after argument of counsel, C. D. Weeks and A. G. Ricaud, attorneys for defendants, A. V. Wills & Sons, and Thomas J. Canovan, trustee in bankruptcy of said A. V. Wills & Sons, for said motion, and I. C. Wright, attorney for the plaintiffs in the above entitled action, the court after hearing said argument, and considering the same and affidavits offered both in support of and against said motion, finds the following facts:

"1. That Pender County Drainage District No. 4 was adjudged and declared to be created and established by the orders and decrees of J. F. Johnson, clerk Superior Court, Pender County, North Carolina, made and entered in the proceedings for the establishment of said district on 19 May, 1917, and on 3 January, 1920, and contained in the records of said proceeding for the establishment of said district, and in the drainage record of Pender County, copies of which are attached to the affidavit of A. G. Ricaud, duly filed as evidence in this motion, and that, thereafter, said district proceeded to elect a board of drainage commissioners, and began to prosecute the drainage work and issue and sell bonds for the prosecution of said drainage work and to provide funds for the cost of same, and the payment thereof, one or more of said drainage bonds being owned by the moving defendants.

"2. That on or about 23 December, 1923, the plaintiffs in the above entitled action, brought said action in the Superior Court of Pender County, N. C., for the purpose of having said drainage district declared illegally organized, and to have same declared null and void, and the bonds issued by said district also declared invalid, null and void, upon the grounds particularly set forth in the complaint in said action; that the said action was thereafter referred to Hon. Cyrus M. Faircloth, referee, by the Superior Court of Pender County, for hearing and determining, and that the same is still pending before said referee, and remains undetermined and undisposed of, and is still pending in the Superior Court of Pender County, before said referee.

"3. That while said action was still pending and undecided and undisposed of both by said court and said referee, the plaintiffs appeared before Hon. R. A. Nunn, judge of the Superior Court of North Carolina, at Wilson, N. C., on 20 May, 1927, and applied for and obtained, *ex parte,* an order appointing Hon. L. J. Poisson, temporary receiver of said drainage district, which said appointment was made permanent by his Honor, W. M. Bond, at Wilmington, N. C., on 9 June, 1927, both of which orders were duly filed in the records of the above entitled cause and appear in the record in this motion. No exception was noted to the order of Judge Bond, and no appeal was taken therefrom.

"4. That drainage districts are political subdivisions of the State, and *quasi*-municipal corporations with all the rights, powers, duties and obligations conferred upon them by the statutes of North Carolina in relation thereto.

"Thereupon, the court orders and adjudges as follows: That while the court has power to appoint receivers, and other ministerial agents of the court, to take over and hold property in *custodia legis* during the pending of the litigation, and for insolvent private corporations, and to carry out and effectuate decrees of the court after judgment, that the orders of the Superior Court heretofore entered in this cause purporting to create a receivership to wind up the affairs of, or dissolve the said drainage district, and constituting the appointee the sole person capable of instituting and defending suits in courts, and taking over the powers and duties of the drainage commissioners before and until the said drainage district is declared invalid or illegally constituted by a court of competent jurisdiction, is irregular and void, and,

"It is ordered and adjudged by the court that the orders heretofore entered by Judge Nunn and Judge Bond be and the same are hereby vacated and set aside.

"It is, further ordered that L. J. Poisson, Esq., the said receiver, file in the Superior Court of Pender County, in said above entitled action, a report of his acts as such receiver, and of all property received or disposed of by him as such receiver, and upon such report and accounting therefor that his bond as receiver be discharged.

"It is further ordered and adjudged that the restraining order against the defendants, N. H. Lockhart, J. T. Wills and A. Lee Bowen, constituting the board of drainage commissioners of Pender County Drainage District No. 4 be and the same is hereby dissolved."

Plaintiffs excepted to the foregoing order, and appealed therefrom to the Supreme Court.

C. E. McCullen and Isaac C. Wright for plaintiffs.

A. G. Ricaud and Eubanks, Whitmire & Weeks for defendants, A. V. Wills & Son, and T. J. Canovan, trustee in bankruptcy of said defendants.

CONNOR, J. The Pender County Drainage District No. 4, was established prior to the enactment of chapter 7, Public Laws 1921. The provision of said statute "that the districts heretofore or hereafter created under the law shall be and constitute political subdivisions of the State" does not determine the nature of said district, at least for all purposes.

In *O'Neal v. Mann,* 193 N. C., 153, we said: "Whatever may have been the purpose of the General Assembly in enacting this statute, and thereby amending chapter 442, Public Laws 1909, it cannot be held to have affected the nature or character of a district established prior to its enactment." The proceeding authorized by statute by which a drainage district may be organized and established is a judicial and not an administrative proceeding. The General Assembly is, therefore, without power, by the enactment of subsequent statutes, to affect vested rights of landowners acquired under orders, decrees or judgments made in such proceeding.

It is further said in *O'Neal v. Mann, supra,* that this Court has uniformly held in decisions sustaining the constitutionality of chapter 442, Public Laws 1909, as amended by subsequent statutes, that a drainage district, established by a proceeding in accordance with the provisions of said statute is not a municipal corporation, falling under the classification which includes counties, cities or towns, school districts, or road districts; but that such district is a *quasi*-public corporation, created for private benefit. The primary purpose of such districts is the drainage of lands included therein for agricultural purposes; this is not a public purpose to be accomplished by a governmental agency. The decisions of this Court in support of this statement are cited in the opinion in that case, in which it is held that a drainage district, upon its organization under chapter 442, Public Laws 1909, was not a public or municipal corporation, functioning as a governmental agency, within a political subdivision of the State.

The contention of appellees in the instant case that the appointment of a receiver for the Pender County Drainage District No. 4 is void, for that the court was without power to make such appointment, cannot be sustained. Whether or not the Superior Court of this State has the power, by judgment or decree to dissolve a drainage district organized under the laws of this State, without special legislative authority, is not determinative of the question presented by this appeal. The relief sought in this action is, in part, that the bonds issued by the commissioners of the district, be declared null and void, and that they be delivered up and canceled for that reason. It cannot be held that the court was without power to appoint a receiver and to authorize and empower such receiver to take possession of and to hold such bonds, and all assets of the district, until the further orders of the court. Whether or not the orders appointing the receiver in this case were erroneous is not presented by this appeal. If they are erroneous relief could have been had only by appeal to this Court, upon assignments of error based on exceptions duly taken. If they are irregular, they could have been attacked only by motion in the cause. The record fails to disclose any irregularity in the orders, in that they were entered contrary to the course of practice of the Court.

The order made by Judge Devin, on the motion of appellees, that the orders signed by Judge Nunn, and Judge Bond, respectively, be vacated, on the ground that they are void, must be reversed. The authorities cited by appellees in their brief, filed in this Court, to the effect that a court is without power, in the absence of special legislative authority, to appoint a receiver for a municipal corporation, such as a county, city or town, are not applicable in the instant case. A drainage district, organized under the statutes of this State is not a municipal corporation of the nature and character of a county, city or town.

The motion made before and heard by Judge Devin was in effect an appeal from the orders of Judge Nunn and Judge Bond. It is well settled by numerous decisions of this Court that no appeal lies from an order of one judge of the Superior Court to another. It has been held that this principle does not apply where the order is merely interlocutory, and not determinative of the rights of the parties. *Bland v. Faulkner,* 194 N. C., 427. When, however, the order is final, with respect to the matter involved, as in this case, the principle must be given full force, for otherwise we could not have an orderly administration of the law by the courts. *Dockery v. Fairbanks-Morse Co.,* 172 N. C., 529;

Cobb v. Rhea, 137 N. C., 295; *Cowles v. Cowles,* 121 N. C., 276; *Henry v. Hilliard,* 120 N. C., 487; *Alexander v. Alexander,* 120 N. C., 474; *May v. Lumber Co.,* 119 N. C., 98.

The sole question presented by this appeal is whether the order of Judge Devin was erroneous, as contended by appellants, for that he was without power to vacate the orders entered in the cause by Judge Nunn and Judge Bond. This question must be answered in accordance with the contention of appellants. The order is, therefore,

Reversed.

DUPLIN COUNTY, O. C. BLANCHARD, J. B. COOPER, TRUSTEE, B. G. D. PARKER, J. F. BRADSHAW, THE BANK OF DUPLIN, W. T. WALLACE, TRUSTEE, AND N. H. CARTER, v. J. F. HARRELL, CLARA I. WELLS, ADMRX., OF E. G. WELLS, J. B. SHEFFIELD, WALLACE GROCERY CO., M. J. CAVENAUGH, B. B. D. PARKER, AND W. L. BYRD, TRADING AS BYRD & PARKER; D. B. HARRELL AND W. F. MURPHY, SR., RECEIVER OF WALLACE GROCERY COMPANY.

(Filed 4 April, 1928.)

1. **Homestead—Transfer or Encumbrance—Effect Thereof.**

   The owner of lands loses his right to a homestead therein allowed by our Constitution, Art. X, sec. 2, upon his conveying the title to the same, by deed, though he may select a homestead thereafter in other of his lands under the provisions of our statute, C. S., 729.

2. **Judgments—Mortgages—Priority—Homesteads.**

   Where there is a recorded judgment, C. S., 614, thereafter the judgment debtor executes a mortgage on certain of his land, the land is foreclosed under prior mortgages antedating the judgment and the judgment debtor makes no claim to his homestead, the judgment creditor has a preference in the proceeds of the sale over the mortgage made subsequent to the judgment.

APPEAL by O. C. Blanchard from *Harris, J.,* at January Term, 1928, of DUPLIN. Affirmed.

The defendant, J. F. Harrell, owned certain lands in Duplin County and prior to the date of the judgment of G. B. D. Parker, and the deed of trust to O. C. Blanchard, executed various mortgages and deeds of trust on the said lands and had suffered several judgments to be taken against him, and this original action was in the nature of a creditor's bill to foreclose the various liens against the said J. F. Harrell, including the payment of several years of taxes due Duplin County, and in said action it was ordered that his various tracts of land be sold and the moneys applied to the payment of the liens, according to their priority. The commissioner, N. B. Boney, under the direction of the court, paid all of the liens down to the judgment of G. B. D. Parker and paid into the clerk's office the sum of $558.76. It was admitted that the said fund was derived from the sale of the 60-acre tract of land included in the deed of trust for the benefit of O. C. Blanchard.

This is a motion in the original action made on affidavit of G. B. D. Parker, asking for an order of the court directing $558.76 to be paid to him *on his judgment against J. F. Harrell, dated 17 December, 1923,* balance due and owing on same is more than $800.00 in principal, and docketed in the office of the clerk of the Superior Court of Duplin County on the same date, this sum of money being derived from the sale of sixty-acre tract of land on which J. F. Harrell, *on 12 November, 1925, executed a deed of trust to J. B. Cooper, trustee for the benefit of O. C. Blanchard,* $1,346.15 and interest due and owing, which deed of trust was on the same day filed for registration in the office of the register of deeds of Duplin County.

J. F. Harrell is a single man, resident of the State and owns no real estate. In the action to foreclose, in which he was made a party, he made no claim to homestead.

The court below, after reciting the facts in the judgment, held as follows: "Upon the foregoing facts, the court is of the opinion that the plaintiff, O. C. Blanchard, is not entitled to hold any of the said $558.76, as the homestead of J. F. Harrell, as against said Parker's judgment, by reason of his mortgage on same as above. It is thereupon considered and adjudged that the said $558.76, now in the hands of the clerk of the Superior Court of Duplin County, be paid over to said G. B. D. Parker by said clerk to be credited in his judgment as above set forth, and that he recover of the said O. C. Blanchard his costs incurred of this motion to be taxed by the clerk." O. C. Blanchard duly excepted, assigned error and appealed to the Supreme Court.

Beasley & Stevens for G. B. D. Parker.
Gavin & Boney for O. C. Blanchard.

CLARKSON, J. The question presented for decision: Has G. B. D. Parker's judgment against J. F. Harrell, dated 17 December, 1923, priority over the deed in trust of J. F. Harrell to J. B. Cooper, trustee, for the benefit of O. C. Blanchard, dated 12 November, 1925? We think so.

In *Wilson v. Patton,* 87 N. C., p. 318, the land was sold under judgments for debts that antedated the Constitution of 1868. At p. 320, it is said: "But he (Patton) claims that he is entitled to one thousand dollars out of the proceeds of the sale of his land in lieu of his homestead, inasmuch as there will be one thousand dollars left after satisfying the executions on the judgments recovered upon debts which antedate the Constitution." At p. 323: "The defendant is entitled to his homestead against all the judgments, the executions upon which were in the hands of the sheriff at the time of the sale, except those in favor of P. F. Patton, administrator; Summey, administrator, and T. J. Lenoir. How then is the fund to be applied? Our opinion is, and we so decide, that in the first instance the sheriff shall reserve one thousand dollars for the homestead, and then apply the residue to the judgments according to the priority of their docketing; but as this will exhaust the fund before reaching the judgment in favor of T. J. Lenoir, as that is privileged against the defendant's right of homestead, it must be paid out of the thousand dollars reserved for the homestead; and the defendant will be entitled to what remains. But as he will be entitled to hold it only during his life, the remainder will be subject to the lien of the judgments as if it were land. The defendant may, if he shall choose to do so, give bond and security to such person as the judge of the Superior Court of Buncombe County may designate, to secure the return of the amount upon his death, to be applied to such judgment or judgments as shall remain unsatisfied according to priority of docketing, or a reference may be ordered by the judge of the Superior Court of Buncombe County to ascertain the value of the life interest of the defendant, Patton, in the residue of the one thousand dollars, after satisfying the Lenoir judgment. But in ascertaining the value of his life interest, the homestead should be estimated at one thousand dollars, as the defendant would have been entitled to that amount for his homestead against the judgments founded upon new notes, if the amount had not been reduced by an application of a portion thereof to the Lenoir judgment."

As before stated, J. F. Harrell made no claim to homestead. Const. of N. C., Art. X, sec. 2, is as follows: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

C. S., 729, is as follows: *"Conveyed homestead not exempt.* The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the Constitution, article ten, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect."

C. S., 614, in part, is as follows: "Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the Superior Court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the Superior Court of any other county upon the filing with the clerk thereof a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment."

In *Chadbourn Sash, Door and Blind Co. v. Parker,* 153 N. C., p. 130, the plaintiff had a docketed judgment against the defendant. Subsequently the defendant and his wife conveyed the property. Plaintiff had an execution to issue on the judgment, thereupon the grantee, (Pae) of Parker demanded that Parker's homestead be allotted to him. At p. 133, it is said: "Even if the homestead has been allotted to Parker before he conveyed to Pae, when thereby he ceased to be 'owner and occupier,' his right to homestead in that land ceased, just as it would if he had ceased to be a 'resident of this State.' "

In *Watters v. Hedgepeth,* 172 N. C., p. 310, it is held: The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. Title to exempt property does not pass to the trustee in bankruptcy, and where the debtor's homestead has been laid off and the lien of a judgment has attached thereto more than four months before the filing of the petition in the bankrupt court, and the judgment creditor has proved his claim as unsecured and the homestead again laid off in proceedings in the bankrupt court, after the discharge of the bankrupt, the judgment creditor, under whose judgment the homestead was first laid off, may issue execution against the lands after the same has been conveyed by the homesteader.

It will be noted in both of the above cases the homesteaders had by deed voluntarily sold and conveyed his homestead. Therefore, he parted with his exemption and "the land, theretofore protected from sale, 'while occupied by him, by virtue of such exemption only, became subject to sale under the lien of the plaintiff's judgment." *Watters v. Hedgepeth, supra,* p. 312.

In *Stevens v. Turlington,* 186 N. C., p. 196, it is said: "In this State, mortgages are practically the same as at common law, with the exception of the mortgagor's equity of redemption and its incidents. We adhere to the doctrine that the legal title passes to the mortgagee, subject to the equitable principle that this passage of the legal title is primarily by way of security for the debt, and that for all other purposes the mortgagor is regarded as the owner of the land. *Gorrell v. Alspaugh,* 120 N. C., 362; *Weil v. Davis,* 168 N. C., 298."

In the present action the land was foreclosed under the mortgages or deeds in trust. The mortgagor, J. F. Harrell, was made a party. He claimed no exemption in the surplus after payment of debts against which he could not claim homestead, as was done in the *Wilson case, supra* (see *Caudle v. Morris,* 160 N. C., p. 168). We think the prior docketed judgment of G. B. D. Parker had priority over the subsequent deed in trust of J. B. Cooper, trustee, for the benefit of O. C. Blanchard. The judgment of the court below is

Affirmed.

THE RALEIGH BANKING & TRUST CO. v. VIRGINIA N. NOWELL, W. B. STARKE AND H. H. NOWELL.

(Filed 11 April, 1928.)

1. **Judgment—Setting Aside for Void Service of Summons—Degree of Proof.**

   Where the summons in an action has been duly served on a party defendant by a proper process officer, it imports verity, and will not be set aside and a judgment vacated in the absence of clear and unequivocal proof that the summons had not in fact been served, and such proof must be more than the one affidavit by the defendant. C. S., 921.

2. **Judgment—On Trial of Issues—Rendition, Form, and Requisites—Time of Rendition and Signing.**

   Where the judge, by consent, has heard a motion in a civil action, to set aside a judgment for want of service on the defendant, on supporting evidence sufficient in law, his action in so doing will not be disturbed on appeal when it is made to appear that he had awarded his decision at the time of hearing the motion and signed the judgment in conformity therewith a few days later, at a criminal term of court.

APPEAL by plaintiff from *Stack, J.*, at September Term, 1927, of WAKE. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard before his Honor, A. M. Stack, judge holding courts of the Seventh Judicial District, on the motion of the defendant, H. H. Nowell, to set aside as to him the judgment rendered in this cause on 6 October, 1926, and being heard on 8 October, 1927, the court finds as a fact:

"1. That notice of motion of defendant, H. H. Nowell, to set aside said judgment was duly served on the plaintiff, and the said motion was duly filed in the office of the clerk of the Superior Court of Wake County on 24 September, 1927.

"2. That from the oral testimony of P. P. Sanders, the deputy sheriff by whom summons was alleged to have been served upon the defendant, H. H. Nowell, and from the oral testimony of the defendant, H. H. Nowell, and from the affidavits filed herein by the plaintiff and said defendant that summons has not, at any time, been served upon said defendant, H. H. Nowell.

"3. The court further finds that the return on the summons alleged to have been served upon the defendant, H. H. Nowell, is not in the handwriting of the said P. P. Sanders, deputy sheriff.

"4. The court further finds as a fact that the defendant, H. H. Nowell, has a meritorious defense to the plaintiff's alleged cause of action.

"It is therefore ordered and adjudged that the judgment rendered in this cause on 6 (8) October, 1926, and which appears in Judgment Docket No. 28, at page 240, be and it is hereby set aside as to defendant, H. H. Nowell.

"It is further ordered and adjudged that the defendant, H. H. Nowell, have until 1 November, 1927, in which to answer amended complaint filed herein or demur thereto."

Jones & Jones and J. W. Bailey for plaintiff.
Douglass & Douglass for defendant.

CLARKSON, J. C. S., 921, is as follows: "When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service." See cases cited under this section.

In *Lake Drainage Comrs. v. Spencer*, 174 N. C., at page 37-8, it is said: "While this is one of the States in which the return on the process is not conclusive, even between the parties and privies to the action, still, under Revisal, 1529 (C. S., 921, *supra*) and the authorities above cited, such return is prima facie correct, and cannot be set aside unless the evidence is 'clear and unequivocal.' 32 Cyc., 517. It would work the greatest mischief if after a judgment is taken it could be set aside upon the slippery memory of the defendant, perhaps years thereafter, that he had not been served. This would shake too many titles that rest upon the integrity of judgments and the faith of purchasers and others relying thereon. The return of the sheriff is by a disinterested person acting on oath in his official capacity and made at the time." *Caviness v. Hunt,* 180 N. C., 385; *Long v. Rockingham,* 187 N. C., 199; *Fowler v. Fowler,* 190 N. C., 536.

The statement of the case on appeal shows "That said motion came on to be heard before his Honor, Judge A. M. Stack, on 8 October, 1927, by consent of plaintiff and defendants." . . . "His Honor, Judge A. M. Stack, thereupon stated in open court that he would find the fact that summons was not served, and that he would render judgment setting aside the judgment against H. H. Nowell hereinbefore entered in this action, to which the plaintiff, the Raleigh Banking & Trust Company, in open court gave notice of exception and appeal."

The record shows that the evidence was all heard by the court below on 8 October, and the judgment rendered on that day, but not actually signed until 12 October, the following week during a term of criminal court of Wake County, which was duly held by the same judge.

We can see nothing prejudicial in signing in writing the judgment of 12 October, rendered on 8 October, 1927. The exception and appeal was taken to the judgment as rendered on 8 October. The signing later was a mere matter of convenience, no rights affected. The judgment put in writing was the same as rendered.

From a careful inspection of the record, we think that the evidence is "clear and unequivocal," that the summons was not served according to law. It has been held in this jurisdiction that a return of a sheriff of the service of a writ cannot be contradicted by the defendant's affidavit that the writ was not served. The return is prima facie true and cannot be contradicted by a single affidavit. The service of process or other papers are very serious matters and should not be set aside lightly. They import verity. *Hunter v. Kirk,* 11 N. C., 277; *Mason v. Miles,* 63 N. C., 564; *Strayhorn v. Blaylock,* 92 N. C., 292; *Chadbourn v. Johnston,* 119 N. C., 282; *Comrs., v. Spencer, supra; Caviness v. Hunt, supra.* For the reasons given, the judgment is

Affirmed.

ELLEN M. BROOKS, EXECUTRIX, v. MRS. P. C. GARRETT AND ROY GARRETT.

(Filed 11 April, 1928.)

Agriculture—Agricultural Liens—Crops on Which Lien for Advancements Rest—Landlord and Tenant—Lien for Rent.

Where a landlord furnishes his tenant advancements for the making of crops, the lien for the rent and for advancements are in equal degree, and now attach, since the amendment of C. S., 2480, by chapter 302, Public Laws 1925, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next.

CIVIL ACTION before *Bond, J.*, at February Term, 1928, of GRANVILLE.

The plaintiff's testator was a landowner in Granville County and rented a certain farm to P. C. Garrett, now deceased, for agricultural purposes. During the year 1925 the landlord furnished certain supplies, for agricultural purposes, during said year to the tenant. In the fall of 1925 the tenant sowed about six bushels of wheat furnished him by said landlord upon the lands of the landlord. The wheat was harvested in 1926 by the tenant, who paid the seed wheat and the portion of the crop due as rent. The tenant, however, refused to pay out of the wheat a balance due the landlord for advances made during the year 1925, prior to sowing the wheat crop in November of that year. Thereupon the landlord seized the wheat crop consisting of 40 bushels, under claim and delivery. The tenant replevied the wheat and when the cause came on for trial the parties agreed that the judge should find the facts and award judgment.

Upon the foregoing facts the trial judge awarded judgment to the plaintiff and the defendant appealed.

Royster & Royster for plaintiff.
John W. Hester for defendant.

BROGDEN, J. The question is this: Is a wheat crop planted in one year and harvested by the same tenant, in another, liable for advancements furnished generally by the landlord and prior to the sowing thereof?

The landlord's lien does not attach to a crop made entirely in a year subsequent to that in which the advancements are furnished to the tenant. *Ballard & Co. v. Johnson,* 114 N. C., 141; *Fleming v. Davenport,* 116 N. C., 153. See, also, 9 A. L. R., 300.

C. S., 2355, provides a lien upon "any and all crops raised on said lands" for rent and advancements made by the landlord "and expenses incurred in making and saving said crops." This statutory lien in favor of the landlord by express declaration "shall be preferred to all other liens." Public Laws 1925, chapter 302, reënacts C. S., 2480, and provides that a lien for advancements made by a supplyman "shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, but that the said lien shall be effective only as to those crops planted within the calendar year of the execution of said lien, and referred to in the said lien." It is clear therefore that a supplyman would have a lien upon the wheat crop in controversy, even though it was harvested after the end of the year in which the supplies were furnished.

The statute further provides that the lien of supplyman shall be preferred to all other liens "except laborer's and landlord's lien, to the extent of such advances." This legislative declaration is broad and explicit enough to sustain the judgment, because it expressly recognizes the superior priority of a landlord's lien. The wheat crop was certainly a crop "raised on said land" as specified in C. S., 2355. In *S. v. Crook,* 132 N. C., 1053, the Court said: "Hay is not cultivated like cotton, any more than wheat is cultivated in the sense that corn is, but the court could not therefore lay down the proposition that either wheat or hay is "not a cultivated crop." A case directly in point is *Miles v. James,* 36 Ill., p. 399. That case involved a wheat crop planted in one year and harvested in another. The Court said in referring to the statute in that State, "the design was to give the landlord a lien upon all crops growing or grown during the year that the rent accrued, and there seems to be no escape from the conclusion, that as this wheat was growing in both years, the rent of each year became a lien upon it, which the landlord may enforce."

The statutes of this State, applicable to the question, make no distinction between the lien of landlord for rent and for advancements made by him, but place both upon a parity.

Affirmed.

E. B. PARKS, ET UX. v. SECURITY LIFE & TRUST CO., ET AL.

(Filed 11 April, 1928.)

1. **Principal and Agent—Rights and Liabilities as to Third Parties—Ratification—Principal May Not Accept Benefits Without Burdens—Equity.**

   The principal may not accept the full or a partial benefit of his agent's unauthorized act, with knowledge, and avoid liability upon his failure to perform the duties fixed upon him by the terms of the contract thus made in his behalf.

2. Trial—Instructions—When Correct Instruction on Evidence Requested Court Must Give it Substantially.

The trial judge commits reversible error in failing to give substantially a material instruction duly requested, embodying a correct principle of law supported by the evidence in the case, though the evidence may be conflicting.

APPEAL by plaintiffs from *Stack, J.*, at November Term, 1927, of FORSYTH.

Civil action to restrain sale under foreclosure and to have plaintiffs' note and deed of trust canceled upon payment, less credits, which plaintiffs allege should properly be allowed.

It is alleged that on 24 August, 1925, the plaintiffs executed a note in the principal sum of $5,000, secured by deed of trust on the *feme* plaintiff's land for the purpose of securing a loan of this amount from the defendant, Security Life & Trust Company, but that $1,000 of said amount was held back and never paid to the plaintiffs.

The note was made to F. G. Spearman & Company, as payee, and endorsed to the defendant, Security Life & Trust Company, for full value, without notice of any equities or defects in the title, so the trust company alleges.

The case was made to turn on whether F. G. Spearman was acting for himself or as agent of the Security Life & Trust Company in making the loan in question. In this connection, the plaintiffs asked the trial court to instruct the jury as follows:

"The relation of principal and agent may be created by ratification with the same force and effect as if the relation had been created by appointment, as where one person adopts and takes the benefits of an act done without his authority, or in excess of it."

The request was denied and the plaintiffs assign same as error, as the evidence bearing upon the question was conflicting.

From a verdict and judgment in favor of the Security Life & Trust Company in the Forsyth County Court, the court of first instance, the plaintiffs appealed to the Superior Court where the judgment of the county court was upheld.

From this order, the plaintiffs appeal, assigning errors.

William Porter and Siler & Barber for plaintiffs.
Manly, Hendren & Womble for defendant, Security Life & Trust Co.

STACY, C. J. The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error. *Marcom v. R. R.,* 165 N. C., 259, 81 S. E., 290; *Irvin v. R. R.,* 164 N. C., 5, 80 S. E., 78; C. S., 565.

A very full and satisfactory statement of the rule, with the reasons for its adoption, will be found in *Baker v. R. R.,* 144 N. C., 36, 56 S. E., 553, opinion by *Walker, J.,* from which we quote briefly: "We have held repeatedly that if there is a general charge upon the law of the case, it cannot be assigned here as error that the court did not instruct the jury as to some particular phase of the case, unless it was specially requested so to do. *Simmons v. Davenport,* 140 N. C., 407. It would seem to follow from this rule, and to be inconsistent with it if we should not so hold, that if a special instruction is asked as to a particular aspect of the case presented by the evidence, it should be given by the court with substantial conformity to the prayer. We have so distinctly held recently in *Horne v. Power Co.,* 141 N. C., at page 58, in which *Justice Connor,* speaking for the Court and quoting with approval from *S. v. Dunlop,* 65 N. C., 288, says: 'Where instructions are asked upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence.' "

In the instant case, the plaintiffs duly preferred a special instruction on the subject of ratification. It would seem that they were entitled to have this given. As between an agent and his principal, the decisions are to the effect that where the principal, with full knowledge of the facts, accepts the benefits of a contract made in his behalf, he must also bear its burdens. *McNair v. Finance Co.,* 191 N. C., 710, 133 S. E., 85.

True, the evidence of the defendant, Security Life & Trust Company, is to the effect that F. G. Spearman was acting for himself and not as agent for said trust company in negotiating the loan in question, which seems to have been accepted by the jury. *Non constat* there is other evidence on the record tending to support the position of the plaintiffs; and, under this evidence, their view of the case, on the question of ratification, should have been submitted to the twelve.

Speaking to the subject in *Waggoner v. Publishing Co.,* 190 N. C., 829, 130 S. E., 609, it was said: "The defendant will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in its behalf. *Starkweather v. Gravely,* 187 N. C., 526. It is a rule too well established to admit of debate that if a principal, with full knowledge of the material facts, takes and retains the benefits of an unauthorized act of his agent, he thereby ratifies such act, and with the benefits he must necessarily accept the burdens incident thereto or which naturally result therefrom. The substance of ratification is confirmation after conduct. 2 C. J., 467. It is also a settled principle of ratification that the principal must ratify the whole of his agent's unauthorized act or not at all. He cannot accept its benefits and repudiate its burdens. *Bank v. Justice,* 157 N. C., p. 375."

For the error, as indicated, in failing to give the instruction, substantially as requested, a new trial must be awarded, and it is so ordered.

New trial.

JOHN ASKEW v. INTERSTATE HOTEL CO., INC.

(Filed 11 April, 1928.)

Corporations—Corporate Powers and Liabilities—Contracts and Indebtedness—Corporation Purchasing Securities of Another Not Liable for Debts of Purchased Corporation When it is Left with Ample Assets.

An existing corporation, when retaining its corporate identity and retaining assets sufficient to pay its creditors, does not effect a merger by exchanging its stock with another and similar corporation, so as to make the latter liable for its debts under the doctrine of implied assumpsit or substitution of debtors, in the absence of fraud. C. S., 1005.

APPEAL by plaintiff from *Moore, Special Judge,* at Second November Term, 1927, of WAKE. Affirmed.

J. C. Little for plaintiff.
Biggs & Broughton for defendant.

CLARKSON, J. This was an action by plaintiff against defendant for labor performed and material furnished in doing some painting on the Sir Walter Hotel. The plaintiff's evidence was to the effect that the contract was with Virgil St. Cloud, who represented the T. L. Bland Hotel Corporation. C. V. York Construction Company had the contract with the Capital Construction Company, for the erection of the hotel; that the plaintiff's work was not included in that contract; that the T. L. Bland Hotel Corporation had a lease on the Sir Walter Hotel.

The minutes of the directors' meeting of Interstate Hotel Company, 10 December, 1923, contains, among other things, a proposition made to it to exchange $500,000 par value of the capital stock of T. L. Bland Hotel Corporation for $400,000 par value of the capital stock of the

Interstate Hotel Company, defendant, fully paid and for $100,000 in cash. The T. L. Bland Corporation continued in existence. It received by the sale $100,000 in cash and it owned at the time the following property: (a) A twenty-year lease of the Sir Walter Hotel at Raleigh; (b) The furnishing and equipment of the Sir Walter Hotel, which cost approximately $175,000; (c) The lease of the Bland Hotel at Raleigh, expiring 1 June, 1927; (d) The furnishings and equipment of the Bland Hotel; (e) The lease of the Yarborough Hotel of Raleigh, expiring on 30 November, 1926; (f) The furnishings and equipment of the Yarborough Hotel; (g) $100,000 par value of the capital stock of Capital Construction Company which owns the Sir Walter Hotel. All of the foregoing property is free from liens and encumbrances, except that the furnishings and equipment of the Yarborough Hotel stand as security for the performance of the lease of said hotel, and that the furnishings and equipment of the Sir Walter Hotel and $50,000 of said $100,000 of capital stock of the Capital Construction Company stand as security for the performance of the lease of the Sir Walter Hotel. The proposition also has a guaranty to hold the Interstate Hotel Company "harmless from any and all debts and obligations and taxes owing by the T. L. Bland Hotel Corporation." There was no agreement by the Interstate Hotel Company to assume the payments of the debts of the T. L. Bland Hotel Corporation. The meeting of the stockholders of the Interstate Hotel Company shows an acceptance of the proposition.

At the close of plaintiff's evidence, the defendant made a motion for judgment as in case of nonsuit. C. S., 567. This motion was allowed by the court below. Plaintiff excepted, assigned error and appealed to the Supreme Court.

"A guaranty is defined by Chancellor Kent (3 Com., 121), as 'A promise to answer for the payment of some debt or the performance of some duty in case of the failure of some person who, in the first instance, is liable for such payment or performance,' and that definition was adopted by this Court in *Carpenter v. Wall,* 20 N. C., 279." *Andrews v. Pope,* 126 N. C., p. 475. See *Trust Co. v. Godwin,* 190 N. C., 512; *S. v. Bank,* 193 N. C., 524.

There are other matters that indicate that there was no such merger or consolidation as would make the Interstate Hotel Company liable for the debts of the T. L. Bland Hotel Corporation, as is contended by plaintiff. There is no suggestion in the record that the sale was to hinder, delay or defraud creditors. C. S., 1005, and cases cited thereunder.

In *McAlister v. Express Co.,* 179 N. C., at page 560, it is said: "The cases which hold that a new corporation must pay the debts of the original one are those where there was a reorganization, consolidation, amalgamation, or union, and the new company is subjected to liability for the debts and torts of the old company upon the ground of an implied *assumpsit,* or of fraud, or under the trust-fund doctrine, or because, by reason of the facts and circumstances, the complete absorption of the old company and its assets, including its franchise, being the leading and controlling one, it is completely substituted in its place, and thereby becomes the debtor to its creditors. It would be manifestly unfair, unjust and contrary to equity that it should thus acquire all of the assets of the other corporation, and its franchise, both to be and to do, leaving no one to be sued by its creditors and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. If it takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it." See *Friedenwald v. Tobacco Co.,* 117 N. C., 544. The citations in the *McAlister case, supra,* fully bear out the position here taken.

In justice to the parties, the record discloses that before this action was instituted plaintiff had a letter from the president of the defendant company. This letter was in answer to one by plaintiff claiming liability on the part of the defendant, and is as follows: "Replying to your letter of 1 November (1924), we do not owe Mr. Askew anything for painting or anything else as far as we know. The Capital Construction Company may owe him, but that we know nothing about."

The T. L. Bland Hotel Corporation has ample assets left to pay the claim of plaintiff, if in law it owes him.

For the reasons given, the judgment is

Affirmed.

STATE v. CLARENCE THOMAS, ALIAS C. O. THOMAS.

(Filed 11 April, 1928.)

Appeal and Error—Requisites and Proceedings for Appeal—Failure to Prosecute Appeal—Rule of Court.

An appeal by defendant convicted of a capital felony will be docketed and dismissed when taken and not prosecuted under the rules of court on motion to docket and dismiss, made by the Attorney-General; no error appearing upon the face of the record. *S. v. Ward,* 180 N. C., 693.

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. This was a criminal prosecution tried at the January Term, 1928, Forsyth Superior Court, upon an indictment charging the prisoner, Clarence Thomas, alias C. O. Thomas, with a capital felony, murder in the first degree, which resulted in a conviction and sentence of death. The defendant gave notice of appeal, but this has not been prosecuted as required by the rules. *S. v. Taylor,* 194 N. C., 738. Hence the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881. But this we do only after an examination of the case to see that no error appears on the face of the record, as the life of the prisoner is involved. *S. v. Ward,* 180 N. C., 693, 104 S. E., 531. None appears in the instant case.

Appeal dismissed.

D. R. NANCE v. OLDEN WELBORNE.

(Filed 11 April, 1928.)

Usury—Contracts Not Usurious—Payment of Fee to Attorney of Borrower to Secure Extension of Loan.

A fee paid by the borrower of money to an attorney for securing an extension of time on a note from the holder, without the latter's knowledge, who only receives the legal rate of interest upon the sum loaned, does not fall within the intent or meaning of our statute against usury.

APPEAL by defendant from *Deal, J.,* at January Term, 1928, of FORSYTH.

Civil action for claim and delivery and to recover on a promissory note.

By stipulation of counsel, duly entered of record, the fact situation was agreed upon, a jury trial waived, and the cause submitted to the judge for determination, as a matter of law, on undisputed facts. These, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

The defendant, being indebted to the plaintiff in the sum of $40.00, employed an attorney and paid him $5.00 to secure an extension or renewal of the loan for 60 days. In this connection, the attorney prepared a new note and mortgage and delivered same to plaintiff, who received 6 per cent on the money loaned, and no more. Plaintiff knew nothing of the arrangement between the defendant and his attorney, so far as the record discloses. Under these facts, judgment was entered for plaintiff, disallowing defendant's counterclaim for usury, from which the defendant appeals, assigning error.

W. T. Wilson for plaintiff.
Mangum Turner for defendant.

STACY, C. J. A borrower employs an attorney and pays him $5.00 for preparing note and chattel mortgage and securing extension or renewal of a loan of $40.00 for 60 days. Does the payment of this fee to the borrower's attorney amount to exaction of usury on the part of the lender who knew nothing of the arrangement between the borrower and his attorney? The question answers itself in the negative. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Miller v. Dunn* and *Abdallah v. Dunn,* 188 N. C., 397, 124 S. E., 746; *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334.

Affirmed.

STATE OF NORTH CAROLINA EX REL. JOHN C. GILMORE, CLERK SUPERIOR COURT, v. LOLA V. WALKER, EXECUTRIX, AND U. S. FIDELITY & GUARANTY COMPANY.

(Filed 11 April, 1928.)

1. **Clerks of Court—Liability on Official Bond—Sureties—Time of Default—Duration of Liability.**

The surety on the official bond of the clerk of the Superior Court for defalcation of moneys he has received in his official capacity is liable only to the extent of such misappropriation for the term covered by the bond, and to the extent of the penalty therein, and this principle applies when the same surety is on several successive bonds of the same clerk, given upon his successive election to and induction into this office.

2. **Same—Presumption of Time of Default—Burden of Proof.**

When a defaulting clerk of the Superior Court has several times succeeded himself in that office, and has given his several bonds with the same surety for the several terms of such office, in the absence of evidence to the contrary, the presumption is that he defaulted as to the various amounts he has received at the various times they were paid to him, with the burden upon the surety upon the bond, and the personal representative of the deceased clerk, to show to the contrary.

3. **Same—Annual Report Raises Prima Facie Case if in Compliance with C. S., 956.**

The provisions of C. S., 956, requiring an annual report of the condition of his office by the clerk of the Superior Court to the county commissioners raises a prima facie case of its correctness only when the statute is substantially complied with, so that the report show an itemized statement of the funds held, the date and source from which they were received, the persons to whom due, how invested, and where, and in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of the investment of said fund; so that the report may accordingly be audited, and published in accordance with C. S., 957.

4. **Same—Parties Entitled to Recover Against Surety—Judgment Debtor—Misappropriation of Payment.**

Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the Superior Court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money.

STACY, C. J., did not sit.

CIVIL ACTION before *Devin, J.,* at February Term, 1928, of CUMBERLAND.

The plaintiff is the clerk of the Superior Court of Cumberland County, and the defendant, Lola V. Walker, is executrix of the last will and testament of W. M. Walker, former clerk of the Superior Court of said county, and the defendant, United States Fidelity & Guaranty Company, executed the official bonds given by said Walker. The question was referred to a referee, who heard all of the evidence and filed report setting forth his findings of fact and conclusions of law. The plaintiff and the defendant, United States Fidelity & Guaranty Company, filed exceptions to the report. All of the exceptions were overruled and judgment entered in accordance with the findings of the referee, from which judgment the United States Fidelity & Guaranty Company appealed.

Dye & Clark, Averitt & Blackwell, Rose & Lyon, J. W. Currie, S. C. McPhail, J. O. Tally, Cook & Cook, Robinson, Downing & Downing, Oates & Herring, and Nimocks & Nimocks for plaintiff.

Connor & Hill for United States Fidelity & Guaranty Company.

BROGDEN, J. A. A. McKethan, clerk of the Superior Court of Cumberland County, died, and on 5 February, 1915, W. M. Walker was duly appointed and qualified as clerk of said court. He held office under this appointment until 4 December, 1916, when he was duly elected for the remainder of the McKethan term, which expired 2 December, 1918. On 2 December, 1918, by virtue of his election Walker entered into a full term of four years, expiring December, 1922. On 4 December, 1922, by virtue of his election he entered upon another full term, expiring the first Monday in December, 1926. He died in office 31 July, 1926, and the plaintiff was duly appointed clerk in his stead, and thereafter was duly elected for the full term from December, 1926, to December, 1930. Walker, the deceased clerk, in compliance with the law, gave four official bonds of $10,000 each, with the defendant United States Fidelity & Guaranty Company as surety on each of said bonds. These bonds cover the following periods, to wit: First bond, from 5 February, 1915, to 4 December, 1916; second bond, from 4 December, 1916, to 2 December, 1918; third bond, from 2 December, 1918, to 4 December, 1922; fourth bond, from 4 December, 1922 to .... December, 1926.

The referee finds:

(1) That from 5 February, 1915, to 4 December, 1916, Walker as clerk had received by virtue of and under color of his office for the use of various persons named in the referee's report, various sums of money aggregating $3,957.19.

(2) That from 4 December, 1916, to 2 December, 1918, the said clerk received as aforesaid sums of money aggregating $7,517.78.

(3) That from 2 December, 1918, to 4 December, 1922, said clerk had received as aforesaid sums of money aggregating $13,374.27.

(4) That from 4 December, 1922, to 31 July, 1926, the date of his death, said clerk has received as aforesaid sums of money aggregating $44,045.63.

On 22 December, 1926, the plaintiff made demand upon the executrix of the estate of said deceased clerk and the defendant bondsman for the sum of $68,894.87, same being the total of the foregoing items. In response to said demand the executrix paid to the plaintiff the sum of $5,585.00, of which sum $3,828.57 has been paid out and applied under specific directions of the executrix, and the sum of $1,756.43 is still in the hands of plaintiff for general and pro rata distribution. During December, 1922, at the request of the board of county commissioners, Walker submitted to the auditor and clerk of the board an "annual report of the condition of the office of the clerk of the Superior Court." This report showed "liabilities" to various parties in various amounts, the total of such aggregating $32,748.48. Under the heading "Assets of C. S. C. Office" in said report appeared certain specifically designated items, and the following indefinite items: "Notes and securities held by C. S. C., $31,062.71." The report concludes as follows:

Recapitulation of Liabilities

Receivership account	$ 4,819.03
Trust acct., fines, forfeitures, costs, jury tax and pension account	32,748.48
Total	$37,567.51

Assets

Deposits in banks, paid to treasurer, fines and forfeitures, paid to Confederate soldiers and widows, and notes and securities held by C. S. C.	$37,567.51

The referee found that the foregoing report was never "formally accepted or officially passed upon by said board nor by its chairman, nor by any committee of said board, but same was silently accepted by said board as a compliance with the statutory requirement and request of said board that said clerk file with said board the report annually required of him by law."

The referee also found that the clerk, at the time of his death, was in default as to all amounts hereinbefore set out, and that such default occurred at the time of the receipt of the respective funds.

The finding of fact that default occurred upon receipt of the funds was based entirely and solely upon the presumption of law arising from the failure of defendant to pay over and account for such fund upon demand. There was no actual evidence that any sum had been misappropriated or misapplied by the clerk, except that upon demand none of the funds were found and paid over save the sum of $5,585.00 heretofore referred to.

Thereupon the referee found that the defendant surety company was liable for the following amounts, to wit: (1) $3,957.19, plus the claim of J. T. Williston for $117.12, upon the first bond. (2) $7,517.78 upon the second bond. (3) Penal sum of the third bond. (4) Penal sum of the fourth bond. It was stipulated by consent of all parties that any final judgment rendered against the United States Fidelity & Guaranty Company, should bear interest from the February Term, 1927, Cumberland Superior Court.

The plaintiff and the defendant surety company, filed exceptions to the report of the referee. These exceptions were overruled by the trial judge and judgment entered against the defendant executrix for the sum of $67,255.56, and against the defendant surety company for the respective amounts found by the referee to be properly chargeable against the respective bonds as hereinbefore set out.

Three questions of law are thus presented upon the record:

1. When did the defalcations occur?
2. What is the legal effect of the report filed by the clerk in December, 1922?
3. What is the legal status of the claim of J. T. Williston?

Bearing in mind that there was no evidence as to when any of the funds were misappropriated by the clerk and that he had been receiving money in his official capacity through a term of years, the question that necessarily stands at the threshold of this inquiry is: Did the default occur upon receipt of the money by the clerk or upon demand and refusal on 22 December, 1926? Discussing the question in *Furman v. Timberlake,* 93 N. C., p. 66, this Court said: "When he receives money in his official capacity, it is his duty to hold it, but not to withhold it, and he cannot be said to withhold it unless he is put in default by refusing to pay it to the party to whom it is due, and that necessarily implies a demand." If the clerk has misappropriated or converted the money, then no demand is necessary, and the statute runs from the time of the conversion; but if no conversion is shown, the statute runs from the refusal to pay on demand. Again in *Morgan v. Smith,* 95 N. C., 396, the law is thus stated: "The governing principle is this: the obligation to hold and pay over the money to the party entitled to it when called on, is incurred when the money is received, and if not so paid over, without other proof, the bond then in force is responsible. It is matter of defense and excuse that it has been paid over to the successor, and this the defendant ought to show. The failure of the clerk to pay over when the fund is demanded, is cogent evidence of a *devastavit* committed at some previous stage, and to shift the liability from one term to another, and from the bond formerly liable to another, proof ought to come from the delinquent, or from his sureties."

Under the law the clerk is an insurer of funds properly and legally paid into his hands by virtue of his office and under color thereof. His liability is founded upon public policy as well as upon the language of the official bond. *Smith v. Patton,* 131 N. C., 396; *Marshall v. Kemp,* 190 N. C., 491. It is established law in this State that failure of the clerk to pay upon demand, raises the presumption that the money was misappropriated and converted upon receipt thereof, and the burden is upon him to show the contrary. *Presson v. Boone,* 108 N. C., 79; *Marshall v. Kemp,* 190 N. C., 491.

After thorough examination of the authorities this Court held in *S. v. Martin,* 188 N. C., 119, that each bond of a clerk is liable only for defalcations occurring during the term for which the bond is given, even though the principal and surety be the same for all terms. *Stacy, J.,* writing for the Court, said: "Each term, like every tub of Macklinian allusion, 'must stand upon its own bottom.' "

So that, nothing else appearing, upon demand and failure to pay over the law presumes that the amounts properly received by the clerk in his official capacity during any particular term was misappropriated at the time of the receipt of such fund, and the bond for each particular term is liable for the amount so misappropriated during such term, not, however, to exceed the penal sum of the bond and interest.

But the defendant surety company asserts that the report filed by the clerk in December, 1922, rebuts the presumption that he had converted the funds prior thereto for the reason that such funds were shown in said report as then in the hands of the clerk. The defendant surety company further contends that the report of said clerk shows the identical items found by the referee up to the date of said report, and that as to such items default must have necessarily occurred subsequent to December, 1922, and, if so, the last bond of $10,000.00 would be the only liability imposed upon the surety. The surety company admits liability for specific items set out in the record, which were paid to the clerk prior to December, 1922, and not shown on said report. These contentions therefore raise the question as to the legal effect of the official report of an officer when such report is made by command of statute and in accordance therewith.

C. S., 956, requires the clerk of the Superior Court to make an annual report on the first Monday of December of each and every year "or oftener, if required by order of the board of county commissioners," of all public or other funds in the hands of such clerk by virtue or color of his office. This report in order to comply with the statute must show: (1) An itemized statement of the funds held. (2) The date and source from which they were received. (3) The person to whom due. (4) How invested and where. (5) In whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of the investment of said fund. C. S., 957, provides for the audit, approval and publication of said reports.

The legal effect of such official report has been the subject of extensive research and debate in the appellate courts. There are two distinct and independent lines of thought upon the subject. Some courts hold that such reports are conclusive, that is to say, the presumption is that the money which appeared to be in the hands of an official at the time of the filing of such report is conclusively presumed to be in his custody and control, at such time. Other courts hold that such reports do not create a conclusive presumption, but constitute only prima facie evidence that such funds are in the hands of the officer at the time of making such report. The courts holding the "conclusive" view rely upon the following cases: *Baker v. Preston,* 21 Va., 235; *Mumford v. Overseers,* 25 Va., 313; *Boone County v. Jones,* 54 Iowa, 699, 37 Am. Reports, 229; *Morley v. Town of Metamora,* 78 Ill., 394; *Cowden v. Trustees,* 235 Ill., 604, 23 L. R. A. (N. S.), 131.

The "prima facie" view is clearly expressed by *Lurton, Circuit J.,* in *Supreme Council v. Fidelity & Casualty Co.,* 63 Fed., 48 as follows: "There has been a wide difference of opinion entertained by American Courts as to the conclusiveness of official reports, or entries made by public officials in the ordinary course of official duty. There is a respectable line of authorities, beginning with the case of *Baker v. Preston,* 1 Gilmer (Va.), 235, holding that such entries and report are conclusive both from the official making them and the sureties upon his official bond. That case involved the liability of sureties upon the bond of the state treasurer who, at the beginning of the second term, had on hand, according to his own books, a large balance brought forward from a preceding term. The sureties were held concluded by the book balance thus brought forward, and not suffered to show that in fact the balance on hand was much less, by reason of a defalcation committed during a former term and not appearing upon the books. The decision was by a divided court. *Judge White* dissented in a very able opinion, based upon the total want of authority to support the conclusion of the court. The decision has been much criticized in subsequent opinions of the Virginia Supreme Court. . . . It has been followed in *State v. Grammer,* 29 Ind., 530; *Morley v. Town of Metamora,* 78 Ill., 394; *City of Chicago v. Gage,* 95 Ill., 593; *Boone County v. Jones,* 54 Iowa, 699, 2 N. W., 987, and 7 N. W., 155, and perhaps others. The doctrine has been repudiated, and such reports and entries held to be only prima facie evidence, and open to contradiction, by a decided weight of judicial opinion. The annotator in *Boone County v. Jones, supra,* 37 Am. Reports, p. 236, said: "We are inclined to think the weight of authority is against the principal case." The Supreme Court of New Mexico, in the case of *Salazar v. Territory,* 41 Pac., 531, involving the breach of the official bond of a former treasurer of Lincoln County, referring to *Baker v. Preston, supra,* says: "This case has been approved in Illinois and some other states, and also in Arizona; but it is opposed by the great weight of authority and is not in harmony with sound principle." In a later Virginia case (*Craddock v. Turner,* 6 Leigh, 124), *Judge Tucker* says that the opinion in *Baker v. Preston* "has certainly not been acceptable to the profession." In *State v. Rhoades,* 6 Nevada, 352, the Court says that "it is at variance with all the cases we have been able to consult, both American and English." And, though *Baker v. Preston* was at one time followed in Indiana (*State v. Grammer,* 29 Ind., 530), it was afterwards repudiated (*Lowry v. State,* 64 Ind., 421). *Baker v. Preston* seems to have been since overthrown in Virginia, in *Board v. Dunn,* 27 Grat., 622. The rule generally recognized is thus stated in Brandt, Sur. sec. 522: "The entries made by an officer in public books, while in the discharge of his duty, or returns made by him to public authorities, are generally prima facie—but not conclusive—evidence against his sureties of the facts thus stated." *U. S. v. Eckford's Ex'rs.,* 1 How., 250; *Brune v. U. S.,* 17 How., 437; *U. S. v. Stone,* 106 U. S., 527; *Moses v. U. S.,* 166 U. S., 571, 41 L. Ed., 119.

Applying these principles of law to the case at bar, we have this situation: The referee finds that Walker as clerk received certain specified sums of money during each of his successive terms. Demand having been made upon his executrix and neither money nor security being produced, the law presumed that the funds were misappropriated and converted upon receipt thereof. However, the surety offers the official report of Walker, made in December, 1922, which said defendant contends showed that practically all of the money received up to that time by him as clerk was actually in his hands, by reason of the fact, that such report being required by the statute was prima facie evidence that the funds shown therein were then in hand. Hence, it necessarily must follow, according to the contention of the sureties, that the misappropriation occurred after December, 1922, and therefore the last bond only would be liable.

Undoubtedly the contention of the surety would be correct if the report of Walker had been made in accordance with the statute. These official reports required by law are in many instances the basis of credit. Banks loan money in reliance upon the accuracy and truthfulness of reports submitted by individuals. Millions of dollars are loaned each year to municipal corporations in reliance upon the integrity of official reports purporting to state the financial condition of such municipalities. To strike down the integrity of these reports, required by law, would be a serious blow to the security of business transactions. At the same time, however, persons who deal with officers, are charged with notice of the requirements of the law with respect to official reports to be made by such officers, and the presumption of correctness or prima facie evidence of correctness can only arise where such official reports, substantially, at least, comply with the mandate of the statute.

The report of Walker, in our judgment, does not substantially comply with the mandate of C. S., 956, in the following particulars: (1) It fails to give the date and source from which the funds were received. (2)It fails to show how said funds were invested and where invested. (3) It fails to show in whose name the funds are deposited. In other words, the report fails to identify the funds. For instance, the clerk claims credit in his report for "notes and securities held by C. S. C., $31,062.71." No auditor could identify or check these funds from the information given in the report. Again, the clerk claims credit in said report for "trust account funds, forfeitures, costs, jury dues and pension account, $32,748.48." This is a mere blanket declaration and is not at all what the law contemplates. We are therefore of the opinion and so hold upon the entire record that the report of the clerk filed December, 1922, was not such an official report as the law contemplates, and hence raised no presumption of its correctness, or to state the proposition differently, did not constitute prima facie evidence of the correctness of the entries therein contained.

The third question relates to a claim of J. T. Williston for $117.12. The facts with reference thereto are these: On 16 September, 1915, J. T. Williston paid the clerk the sum of $117.12 in payment of a judgment duly docketed against him in the office of said clerk. The clerk failed to make any entry of payment on any of said judgments against Williston, and in 1923, Williston attempted to negotiate a loan upon his land and judgments were found docketed against him and uncanceled. Thereupon, in order to secure the loan, Williston was compelled to pay the judgment a second time. The referee found that upon the payment of the judgment a second time, Williston "was *eo instanti* subrogated to the rights of action on the part of said creditor, or creditors, and the said Williston in his right and name, is entitled to recover of the defendants, Lola V. Walker, executrix of W. M. Walker, and the United States Fidelity & Guaranty Company, the surety on the official bond of said W. M. Walker, C. S. C., for the term and period in which said defalcation occurred, the sum of $117.12, with 6 per cent interest thereon from 16 September, 1915, and the costs of said Williston, in this behalf expended; such recovery, taken together with that specified in the conclusion of law No. 4, not to exceed, exclusive of costs, the penal sum of said bond, to wit, $10,000.00." The surety contends that the doctrine of subrogation does not apply for the reason that the second payment of said judgment by Williston was a voluntary act, and that if there was a misappropriation of the amount, the cause of action, therefore, would inure to the judgment creditors of Williston.

C. S., 617, provides that a judgment debtor may pay the judgment to the clerk of the court "and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court," etc. The question as to whether the equity of subrogation arises from this transaction is immaterial. The money paid by Williston to the clerk was never applied by the clerk to the judgment. It therefore remained Williston's money and the misappropriation thereof by the clerk would be the misappropriation of Williston's money, and would therefore constitute a valid claim in his behalf against the surety.

Upon the entire record we are of the opinion that the judgment rendered should be upheld.

Affirmed.

STACY, C. J., did not sit.

W. MARVIN MANGUM, W. WATTS MANGUM, Y. PROCTOR MANGUM, ROSA A. PICKETT, BESSIE MANGUM AND INEZ MANGUM v. DURHAM LOAN AND TRUST COMPANY, A CORPORATION.

(Filed 11 April, 1928.)

1. Wills—General Rules of Construction—Intent of Testator.

In construing a will the intent of the testator will be enforced as gathered from the related parts of the entire instrument.

2. Same—Presumption Against Intestacy.

In construing a will there is a strong legal presumption against intestacy.

3. Same—Nature of Estates and Interests Created.

Where the testatrix has provided in her will for the conversion of her real estate into cash, and in a residuary clause provides that the money shall be divided by the trustee named into four equal parts, one part to each of her two sisters, naming them, and if either of them be not living at the time of the testatrix's death then to the heirs at law of the deceased sister *per stirpes*, one part to her brother-in-law in fee, and one part to her brother, to be held by her executor in trust to invest and pay over to him the net proceeds "during his lifetime, and at his death to distribute the proceeds to his children who may be living at that time": *Held*, the children of the brother living at the time of his death take the *corpus* of the fund *per stirpes*.

4. Same.

A devise of lands will be construed in favor of the early vesting of the title when this can reasonably be done.

APPEAL by defendant from *Bond, J.*, at January Term, 1928, of DURHAM. Affirmed.

The 20th paragraph of the will of Rebecca Ella Mangum, is as follows: "I hereby give and devise all the rest and residue of my property of every kind whatsoever, both real and personal, to my executor, in trust nevertheless, to dispose of the same at public auction or private sale, and convert the proceeds into cash and pay all of my debts, and provide for the expense of settling my estate, payment of legacies, creation of trust funds of every kind hereinbefore mentioned. After all of said provisions have been properly made, I hereby instruct and empower my said executor to divide the balance of cash then remaining into four equal parts; one of such equal parts I direct my executor to pay over to my said sister, Melissa L. Proctor, and, if she be not living at the time of my decease, to her heirs at law *per stirpes* and not per capita. One of such equal parts I direct my executor to pay over to my said sister, Elizabeth J. Umstead, and if she be not living at the time of my decease, to her heirs at law, *per stirpes* and not per capita. One of such equal parts I direct my executor to pay over to my brother-in-law, John R. Proctor, who has for years attended to my affairs for me without charge. *The remaining equal part I hereby direct and empower my said executor to hold in trust to invest and pay over the net proceeds from such trust fund to my brother Bart Mangum, during his lifetime, and at the decease of my said brother, Bart Mangum, I hereby direct and empower my said executor to distribute the proceeds of said trust fund to the children of my said brother, Bart Mangum, who may be living at the time of his death, share and share alike.*"

Rebecca Ella Mangum is dead and her will and codicils were duly probated in the office of the clerk of the Superior Court of Durham County on 28 July, 1919, and are recorded in said office in Book of Wills No. 3, p. 104. The Durham Land & Trust Company, the executor and trustee named in the will duly qualified and is acting as such. As executor of the estate of the said Rebecca Ella Mangum under said will, the Durham Loan & Trust Company has settled the estate; all of the debts, legacies, etc., therein mentioned have been paid; a final account of the settlement of said estate was filed by the Durham Loan & Trust Company in the office of the clerk of the Superior Court of Durham County on 26 January, 1922, and recorded in Book of Settlements No. 4, at page 568; according to the said final account filed by the Durham Loan & Trust Company, executor, the sum of $11,517.61 was paid to the Durham Loan & Trust Company as trustee for Bart Mangum, as provided for in the 20th paragraph of said will. That from the date of the filing of the final account until about 1 November, 1927, the income from said trust fund was paid by the said Durham Loan & Trust Company, trustee, to Bart Mangum. That on 3 November, 1927, the said Bart Mangum died, leaving at the time of his death the plaintiffs in this action as his only children.

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, W. M. Bond, judge presiding, and Wm. B. Umstead, counsel for plaintiffs, and F. L. Fuller, Jr., counsel for the defendant, being present, the court finds the following facts: That it was the intention of the testatrix, Rebecca Ella Mangum, in her will as set forth in the complaint in this cause that the principal of the trust fund created in paragraph 20 of the said will for the benefit of her brother, Bart Mangum, during his lifetime be paid over share and share alike to the children of the said Bart Mangum living at the time of his death. Wherefore, it is considered, ordered and adjudged: (1) That the plaintiffs recover of the defendant the sum of $11,517.61, with interest thereon from 3 November, 1927, until paid, and that the said amount be distributed to the plaintiffs in this cause share and share alike. (2) That the cost of this action to be taxed by the clerk, be paid out of the amount of this judgment."

William B. Umstead for plaintiffs.
Fuller, Reade & Fuller for defendant.

CLARKSON, J. The plaintiffs contend that upon the death of Bart Mangum the principal, or *corpus,* of the fund should be turned over to his children, the plaintiffs, who were living at his death, "share and share alike." On the other hand, the defendant contends that it should pay over to the children of Bart Mangum, share and share alike, not the principal, or *corpus,* of the fund, but the proceeds of said fund, or, in other words, the income thereof. We think the contention of plaintiffs correct. The primary purpose of construing a will is to ascertain and give effect to the intention of the maker. The intention of the maker must be ascertained from the whole instrument. *Patterson v. McCormick,* 181 N. C., 311; *Pilley v. Sullivan,* 182 N. C., 493; *Walker v. Trollinger,* 192 N. C., 744; *Williams v. Best, ante,* 324; *Brown v. Brown, ante,* 315. The trust fund in controversy was created from the residuary part of the estate of Rebecca Ella Mangum.

"When a will is executed the reasonable and natural presumption is the testator intends to dispose of his entire estate. There is no presumption of an intention to die intestate as to any part of his estate when the words used by the testator will clearly carry the whole. Therefore, in the construction of doubtful clauses in a will, that interpretation is to be adopted if possible which avoids a partial intestacy, unless it clearly appears that the testator intended to die intestate as to part of his property. The presumption against an intestacy is particularly strong where the subject of the gift is the residuary estate. An intestacy is a *dernier ressort* in the construction of wills, and it has been said that the abhorrence of courts to intestacy under a will may be likened to the abhorrence of nature to a vacuum." 28 R. C. L., sec. 189, at pp. 227-8. See *Powell v. Wood,* 149 N. C., p. 235; *Austin v. Austin,* 160 N. C., 367; *Kidder v. Bailey,* 187 N. C., 505.

It will be noted by reference to paragraph 20 of said will that the testatrix gave to each of her two sisters a fund equal to that created for the benefit of her brother, Bart Mangum. Further, that said paragraph provides that in the event that either of her sisters were not living at the time of her death, then that such share should go to the said sisters' heirs at law. This would tend to show that it was the intention of the testatrix that the trust fund created for the benefit of her brother, Bart Mangum, should at the time of his death be paid over to the children of her said brother in like manner as was provided therein for the children of her two sisters. No further disposition of said trust fund was made by the testatrix other than to the children of the said Bart

Mangum. This would further indicate that the testatrix intended that the children of Bart Mangum should receive the said fund at the death of the said Bart Mangum. If any other view is taken, then at some time in the future a part of the estate of the said Rebecca Ella Mangum would become intestate.

The word *proceeds* is one of equivocal import. In the interesting decision of *Mr. Justice Bradley* in *Phelp v. Harris,* 101 U. S., 370, 25 L. Ed., 855, speaking of *proceeds,* he says: "This is also a word of great generality." *Halliburton v. Phifer,* 185 N. C., 366. See *Benevolent Society v. Orrell, ante,* 405.

"Under our form of government the law favors the early vesting of estates to the end that property may be kept in the channels of trade and commerce." *Walker v. Trollinger,* 192 N. C., p. 744.

"In the interpretation of a will the dominant or primary intention, gathered from the whole thereof and all its provisions, must be allowed to control, and a particular and minor intent is never permitted to frustrate a general and ulterior object of paramount consideration. Accordingly in interpreting wills favor will be accorded to those beneficiaries who appear to be the special objects of the testator's bounty." 28 R. C. L., part sec. 179, at page 219.

The two sisters, the brother-in-law and Bart Mangum and the children of her sisters and brother were special objects of her bounty.

It will be noted again, that under paragraph 20 of the will, the testatrix divided the rest and residue of her estate into four equal parts. The two sisters' parts are given to them absolutely, if they be living at her death; if not, to their heirs at law *per stirpes.* One part to her brother-in-law absolutely. No doubt, for some good reason, her brother's part was to be held in trust and the net proceeds paid over to him during his lifetime, with the idea, perhaps, that it would meet his needs. *Then distribute the proceeds of said trust fund* to the children of her brother living at the time of his death, share and share alike. We are forced to the conclusion that the *corpus* is meant.

We think that the intention of the testator was to create a trust fund for the benefit of her brother during his lifetime, and at his death the *corpus,* or principal, should be distributed, share and share alike, to the children of her brother living at his death. The judgment of the court below is

Affirmed.

W. T. TADLOCK ET AL. v. TOBITHA SHEPPARD MIZELL ET AL.

(Filed 18 April, 1928.)

1. **Deeds and Conveyances—Construction and Operation—Estates and Interests Created—Deed to Building Carries Land on Which Situated.**

A deed sufficient to convey real property in fee simple, describing with sufficient definiteness of location "a certain house or tenement" in a town, conveys the title to the lot that the building covers, in the absence of the intent of the grantor otherwise appearing in the instrument by a proper interpretation thereof.

2. **Same—Intent of Grantor—Evidence Thereof.**

A sufficient deed conveying a certain house or tenement on lands in fee simple, containing in the warranty of title a clause in parentheses, "but not the land upon which it is situated" does not alone show a sufficient intent of the grantor to convey only the house or tenement as personal property, and not the lands.

3. **Limitation of Actions—Against Unincorporated Town in Adverse Possession of Street.**

When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them has been shown, for thirty-five years for a period of time prior to the enactment of chapter 224, Public Laws 1891; C. S., 435, the right of the town to the use of the street is barred by the statute of limitations.

CIVIL ACTION before *Daniels, J.*, at February Term, 1928, of BERTIE.

On 12 November, 1856, David Outlaw conveyed to John S. Sheppard, his heirs and assigns "a certain house or tenement in the town of Windsor, in the county aforesaid, situate in the street between the warehouse and William Gray and the lot of Jos. B. Spivey, being the same occupied by the late James H. Cherry at the time of his death. To have and to hold the said bargained tenement, or house, together with all rights and privileges to it appurtenant, or anywise belonging to him, the said John S. Sheppard, his heirs and assigns, to his and their only proper use, benefit and behoof. And I, the said David Outlaw, do covenant and agree, for myself, my heirs, executors and administrators, to and with the said John S. Sheppard, his heirs and assigns to warrant and defend the title to the said house or tenement (but not the land upon which it is situated), against the lawful claim, title or demand of each and every person whatsoever." The foregoing deed was duly recorded on 23 April, 1857.

John S. Sheppard died intestate in 1881. The building referred to was burned in 1925. The heirs at law of Sheppard made application to the town of Windsor for a permit to rebuild upon the land covered by said building and the town refused to issue a permit upon the ground that the land upon which said building was situate was a part of a public street of the town of Windsor.

The evidence tended to show that Sheppard went in possession of the property upon the execution of the deed in 1856, and remained in possession until his death in 1881, and that his heirs at law have been in possession of the property, receiving the rents and profits thereof since his death. During his lifetime Sheppard kept the postoffice in the building, and afterwards a shoe shop and grocery store. The evidence further tended to show that the building covered the lot.

The following formal admissions were made by the parties upon completion of the reading of the pleadings:

"1st. That the town of Windsor was incorporated under an act of the General Assembly of 1776, chapter 26, on 5 December, and its various streets, including Granville Street, were laid out and marked off, and the land in question was within the boundaries of said Granville Street when the same was laid out."

"2nd. That on 12 November, 1856, David Outlaw executed and delivered to John S. Sheppard a deed, which was registered on 23 April, 1856, in Book LL, page 10, Bertie County Public Registry, which deed is set out in the exhibits to the complaint, and appears in the record. That upon the execution and delivery of the said deed from David Outlaw to John S. Sheppard, in 1856, the said John S. Sheppard went into possession of the said property therein conveyed and remained in possession of the same up until his death in 1881."

"3rd. That John S. Sheppard died intestate in 1881, and thereafter on 12 June, 1897, his heirs at law instituted a special proceeding to sell the house and lot upon which it was situated for partition among his heirs at law, and in said special proceeding the said lot was duly sold under order of the Superior Court of Bertie County to Tobitha S. Mizell, Emma Morris and Cassie Morris by deed of record 6 November, 1897, Book 91, page 303, Bertie County register of deeds' office, since which time the defendants, Tobitha S. Mizell, Emma Morris Harrell and Castine Morris Persons have been in possession of the said property up to the burning of the said house on 16 November, 1925."

Upon the admission and reading of the deed from David Outlaw to John S. Sheppard, his Honor was of the opinion, and so held that the said deed conveyed not only the house upon the lot of land in question, but conveyed the land upon which it stood.

The following issue was submitted to the jury: "Did the defendants, Tobitha S. Mizell, Emma Morris Harrell, Castine Morris Persons, and those under whom they claim, occupy the 'Sheppard Store Lot,' and hold the same adversely for seven years or more between the years 1856 and 1891?"

The jury answered the issue Yes, and from judgment upon the verdict the town of Windsor appealed.

Craig & Pritchett for town of Windsor.
Hugh G. Horton for heirs at law of J. S. Sheppard.

BROGDEN, J. Does the conveyance, by deed, of "a certain house or tenement" include the land upon which said house is situate? The identical question was involved in the case of *Broadhurst v. Mewborn,* 171 N. C., 402. The Court said: "The devise of a 'house,' when referring, as in this case, to the dwelling-house of the owner, has been held the equivalent of the word messuage, and, in the absence of some term or clause restrictive of its meaning, it is said to convey the lot on which the dwelling is situate, together with the outbuildings customarily used by the owner as a part of his residence." To the same effect is *Wise v. Wheeler,* 28 N. C., 196. The language of the Court is as follows: "We think his Honor was correct in his decision, as to the construction of the deed. The court was called on by the plaintiff's counsel, to put a construction on it. By a conveyance of the store-house and the other houses, the lot upon which they stood was also conveyed, as there is nothing in the deed to control the description, and exclude the lot; and because the deed does convey all of the grantor's property, of every kind." In the *Wise case, supra,* the language was as follows: "The store-house wherein Wheeler had a store, now occupied by him as a post office, with the outhouse and office adjoining."

The Supreme Court of Appeals of West Virginia referred to the question in *State v. Board of Education,* 76 S. E., 127, quoting with approval Devlin on Deeds, section 1200, as follows: "Courts have frequently decided that a conveyance of a building or barn, used as a term of description, will convey the land on which the building or structure is erected." It has been further held that "a grant of a house includes land under it." *Hawkins v. Wilson,* 1 W. Va., 117. Also in *Gidley v. Lovenberg,* 79 S. W., 835, the Court of Appeals of Texas said: "That the term 'buildings' or 'houses' include the real estate on which they are situate, unless the general meaning of the terms is modified by the language of the context, has been decided." *Cassiano v. Ursuline Academy,* 64 Texas, 675. It has been held that the conveyance of "a certain tenement, being one-half of a corn-mill, with all privileges and appurtenances" includes the land upon which the building stands as well as water privileges. *Gibson v. Brockway,* 8 N. H., 465. See note 15 L. R. A., p. 652.

The town of Windsor contends that the condition in the warranty clause of the deed to the effect that the grantor would "warrant and defend the title to said house or tenement (but not the land upon which it is situated)," indicates an intention on the part of the grantor to exclude the land. We do not concur in this construction. The conveyance has all the indicia of a formal conveyance of real estate. It is familiar learning that such formality is neither required nor usual in sales of personal property. The words of the warranty clause "but not the land upon which it is situated" are placed in parentheses, and, as we construe them, constituted a declaration upon the part of the grantor that he did not warrant the title to the land because the land was situated in a public street of the town of Windsor.

It is to be observed that at the time the deed was made and possession taken thereunder by the grantee, that there was no statute of limitations barring the right to acquire title to a public lot, street, lane, alley, square or other public way of any kind by reason of any occupancy thereof. Such a statute of limitations was enacted on 3 March, 1891, as will appear by reference to Public Laws 1891, chapter 224, now C. S., 435. Therefore, the grantee and those claiming under him were in possession of the property for thirty-five years prior to the passage of the statute of limitations. There was sufficient evidence of adverse possession to be submitted to the jury and the verdict of the jury, upon the record, is determinative of the controversy.

No error.

MAGGIE M. STEWART, ADMINISTRATRIX OF SAMUEL E. STEWART v. FRANK STEWART ET AL.

(Filed 18 April, 1928.)

Descent and Distribution—Persons Entitled—Illegitimate Children Made Legitimate by Subsequent Marriage—Statutes—Retroactive Statutes.

The statute of 1917, now C. S., 279, making a bastard child legitimate for the purposes of inheritance from his putative father when the father afterwards marries the mother, is, by its express terms, retroactive as well as prospective in effect; and upon the dying intestate of the father, under the facts of this case, the son is entitled to the balance of the proceeds of the sale of land to make assets to pay debts, subject to his mother's dower right, after paying creditors and court costs, as against the collateral heirs of the father.

APPEAL by defendants, other than Frank Stewart, from *Shaw, J.*, at February Term, 1928, of FORSYTH. Affirmed.

Proceeding for sale of land for assets, and for the determination of a controversy between defendants, Frank Stewart, of the one part, and his codefendants, of the other part, as to which of them is entitled to the balance of the proceeds of the sale of the land, after the payment of the debts of the deceased, and the costs of administration.

It is admitted that Maggie M. Stewart, widow of deceased, is entitled to dower in said land.

The defendant, Frank Stewart, contends that he is the only child of Samuel E. Stewart, deceased, and is therefore his sole heir at law; this contention is denied by his codefendants, who contend that as brothers and sisters, and children of deceased sisters, of Samuel E. Stewart, they are his heirs at law, and are therefore entitled to any sum which may be in the hands of the administratrix, arising from the sale of the land, for distribution, after the payment of the debts of the deceased, and the costs of administration.

The court was of opinion that upon the facts agreed, defendant Frank Stewart is the sole heir at law of Samuel E. Stewart, deceased.

From judgment in accordance with this opinion, defendants, other than Frank Stewart, appealed to the Supreme Court.

Wallace & Wells for appellants.
R. M. Weaver and Hastings & Booe for Frank Stewart, appellee.

CONNOR, J. Samuel E. Stewart died on 19 August, 1926. At the date of his death, he was seized in fee and in possession of lands situate in Forsyth County, and described in the petition herein. His widow, Maggie M. Stewart, was duly appointed administratrix of deceased, and has instituted this proceeding for the sale of the lands of her intestate, for assets. She has joined as defendants in this proceeding Frank Stewart, who contends that he is the sole heir of Samuel E. Stewart, and his surviving brothers and sisters, and the children of his deceased sisters, all of whom deny that Frank Stewart is the heir of Samuel E. Stewart, and contend that they are his heirs. The only question presented for decision arises out of the conflicting contentions of the defendants as to which of them is entitled to the balance that may remain in the hands of the administratrix, out of the proceeds of the sale of the lands of her intestate, after the payment of his debts and the costs of administration.

Frank Stewart was born on 8 July, 1895. At the date of his birth, his mother was unmarried. She charged that Samuel E. Stewart was the father of Frank Stewart and that she had been seduced by him. On 28 July, 1895, Samuel E. Stewart and the mother of Frank Stewart were married. They lived together as husband and wife for several months, when they separated. In May, 1900, the bonds of matrimony existing between them were absolutely divorced by a decree rendered in an action instituted in 1893 in the Superior Court of Forsyth County by Samuel E. Stewart against his wife, the mother of Frank Stewart. The ground for divorce was abandonment. After the separation of Samuel E. Stewart and his wife, Frank Stewart lived with his mother. Samuel E. Stewart was the reputed father of Frank Stewart. Both Samuel E. Stewart and his divorced wife subsequently married again. No children were born to Samuel E. Stewart of his second marriage.

In 1917, the General Assembly of North Carolina enacted a statute, which is now C. S., 279. It is in words as follows:

"When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock."

Upon the facts agreed, by virtue of the statute, Frank Stewart was the heir of Samuel E. Stewart, at his death, in 1926. Samuel E. Stewart, having died intestate, all the lands of which he was seized in fee descended to Frank Stewart, subject to the dower of the widow of Samuel E. Stewart, and subject to sale for assets for the payment of the debts of the deceased, and of the costs of administration. By its express language, the statute is retroactive as well as prospective; by its terms the status of Frank Stewart in his relation to his reputed father, Samuel E. Stewart, at the date of the death of the latter, was fixed. We concur with the opinion of the learned judge of the Superior Court that Frank Stewart is the heir of Samuel E. Stewart. There is no error in the judgment. It is

Affirmed.

N. O. COVINGTON v. HANES HOSIERY MILLS CO., ET AL.

(Filed 18 April, 1928.)

Appeal and Error—Requisites and Proceedings for Appeal—Rules of Court—Briefs—Prosecution of Appeal—Dismissal.

The rules of the Supreme Court regulating the prosecution of appeals are mandatory, and must be equally observed, or the case will be dismissed. Apply *Estes v. Rash*, 170 N. C., 341, as to the requirements of appellant *in forma pauperis.*

APPEAL by plaintiff from *Lyon, Special Judge,* at September Term, 1927, of FORSYTH.

Civil action to recover for a personal injury, resulting in damage to plaintiff's leg and ankle, alleged to have been caused by the negligence of the defendants.

L. W. Ferguson and W. L. Morris for plaintiff.

H. Z. Taylor and Fred M. Parrish for defendant, Southern Construction Company.

Manly, Hendren & Womble for defendant, H. H. Stewart.

STACY, C. J. From a judgment of nonsuit, entered at the close of plaintiff's evidence, 23 June, 1927, in the Forsyth County Court, plaintiff appealed to the Superior Court of said county, where the judgment of the county court was upheld and affirmed, September Term, 1927. Notice of appeal to the Supreme Court was given at said term and plaintiff allowed to appeal *in forma pauperis.* The record was filed in this Court 16 March, 1928, and the case called for argument 3 April, upon the call of the docket from the Eleventh District, the district to which it belongs. No brief has been filed by plaintiff, appellant, but we are referred in one of his assignments of error to a brief filed in the Superior Court, and invited to examine the authorities cited therein. It does not appear that the appellees are even aware of the presence of the case on our docket, as they have filed no brief and lodged no motion to dismiss the appeal.

It seems that the appellant has allowed the case to take its course "like a log floating down a stream" since it was docketed here, and, as all who are acquainted with our rules would expect, it has now "crossed the bar and is drifting out to sea," *i. e.,* the appeal is dismissed.

We have said in a number of cases that a lawsuit is a serious matter and should be given such attention as a prudent man gives to his important business. *Lumber Co. v. Chair Co.,* 190 N. C., 437, 130 S. E., 12. "When a man has a case in court, the best thing he can do is to attend to it"—*Clark, C. J.,* in *Pepper v. Clegg,* 132 N. C., 312, 43 S. E., 906.

The rules governing appeals in the Supreme Court are mandatory and not directory. They may not be abrogated or set at naught (1) by act of the Legislature, (2) by order of the judge of the Superior Court, (3) by consent of litigants or counsel. *S. v. Crowder, ante,* 335. The Court has not only found it necessary to adopt them, but equally imperative to enforce them and to enforce them uniformly. *Waller v. Dudley,* 193 N. C., 354, 137 S. E., 149.

For the convenience of litigants, counsel and the Court, a fixed schedule is arranged for each term of the Court and a time set apart for the call of the docket from each of the judicial districts of the State. The calls are made in the order in which the districts are numbered.

It can readily be seen, therefore, that, unless appeals are ready for argument at the time allotted to the district from which they come, a disarrangement of the calendar necessarily follows, and this often results in delay and not infrequently in serious inconvenience. The work of the Court is constantly increasing, and, if it is to keep up with its docket, an orderly procedure, marked by a due observance of the rules, must be maintained. *Womble v. Gin Co.,* 194 N. C., 577. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties. *Battle v. Mercer,* 188 N. C., 116, 123 S. E., 258.

Speaking to a similar situation in *Estes v. Rash,* 170 N. C., 341, 87 S. E., 109, *Walker, J.,* delivering the opinion of the Court, said: "So it follows that we would affirm the judgment should we consider the case upon the legal merits involved in the motion, but we must dismiss the appeal for noncompliance with the recent rule of this Court requiring the clerk to notify all those who appeal *in forma pauperis,* when docketing appeals, to file six typewritten copies of the record, including case on appeal and briefs, for the use of the clerk and the judges of this Court. We have found it necessary to adopt this rule in order that we may intelligently transact the business of the Court, by a fair understanding of the case as the argument of counsel proceeds. All briefs of appellants should be prefaced by a clear and concise statement, showing the nature of the case and the facts bearing upon the assignments of error. The rule of this Court positively *requires* this to be done, and we again direct attention to it, as it has not been observed in many cases, and it must be complied with. A brief not containing such a statement does not conform to the rule, and hereafter the latter will be strictly enforced, as a compliance with it is so essential in the hearing of causes, and is quite indispensable. This applies to all appeals. Recently we have adopted a rule in regard to filing copies of records and briefs in pauper appeals of which parties and their counsel will take notice, without any special warning from the clerk. There must be, under this rule, six copies each of the record and the appellant's brief. The clerk has informed us that appellant in this case had received notice of the rule, and, not having complied with it, we dismiss the appeal."

For like reason, and on authority of the *Estes case,* the present appeal must be dismissed.

Appeal dismissed.

STATE v. JOE TOLER.

(Filed 18 April, 1928.)

1. Criminal Law—Criminal Negligence—Instruction as to Statute Enacted After Offense Held Error—Manslaughter.

The statute requiring those driving automobiles to keep on the right-hand side of the center of the highway went into effect 1 July, 1927, and upon the trial for manslaughter, for the negligent killing of a pedestrian occurring prior to that time, it is reversible error for the judge to instruct the jury as to this requirement for their consideration in reaching a verdict under evidence tending to show the defendant's violation thereof.

2. Same—Proof of Ordinance of State Highway Commission.

An ordinance of the State Highway Commission as to the safety of the road, when bearing upon the question of the defendant's guilt under an indictment of manslaughter arising from the alleged negligent driving on the State highway, must be properly introduced in evidence in order to support an instruction thereon by the judge.

CRIMINAL ACTION before *Stack, J.,* at December Term, 1926, of CASWELL.

The defendant was indicted for manslaughter for the negligent killing of Jordan Edwards, with an automobile owned and operated by the defendant. The killing occurred on 2 December, 1926. The defendant was convicted and sentenced to the State's prison at hard labor for not less than five nor more than seven years, from which judgment he appealed, assigning errors.

Glidewell, Dunn & Gwynn for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. The trial judge charged the jury as follows: "The law also requires that in the use of these highways we shall go to the right-hand side, keep to the right of the center of the highway, except in passing or exceptional cases; but, in the general rule you must keep to the right of the center of the highway; and if you violate that regulation it is a misdemeanor." The court further charged: "The State has offered evidence tending to show that the defendant was traveling on the wrong side of the road; that the deceased was walking on the left of the center of the highway; and, on this point I charge you that the law requires a pedestrian to walk on the left-hand and not on the right-hand; this requirement of going on the right-hand applies to vehicles; and pedestrians or people on foot are required by law to go on the left-hand side. The reason is you can see the cars coming on your side and if those coming from the rear will observe the law they will pass you; so, the law is that the pedestrian must walk on the left of the center of the road and there is evidence tending to show that the deceased was on the left of the center of the road."

In instructing the jury that the law required drivers of automobiles to keep on the right-hand side or to the right of the center of the highway, the trial judge evidently had in mind section 9, chapter 148, of the Public Laws 1927. This law, however, did not go into effect until the first of July, 1927. But the defendant is charged with committing the crime of manslaughter on 2 December, 1926, or some months prior to the time when the statute became effective. In other words, at the time of the killing it was not an unlawful act for the driver of an automobile to fail to "keep to the right of the center of the highway." While it is true that the defendant was not indicted for a violation of the traffic law, yet the record discloses that the violation complained of was presented to the jury as an element upon which conviction for manslaughter would be warranted. The exception to such instruction is sustained. *S. v. Bond,* 49 N. C., 9; *S. v. Bell,* 61 N. C., 76; *S. v. Denton,* 164 N. C., 530.

The second instruction to the jury to the effect that the law required a pedestrian to walk on the left-hand and not on the right-hand was based upon section 29 of certain ordinances passed by the State Highway Commission under authority of Public Laws 1923, chapter 160. The identical section was referred to by the Court in *Radford v. Young,* 194 N. C., 747. This ordinance of the State Highway Commission was neither proven nor introduced in evidence so far as the record discloses. It does not come within that class of legislative enactments of which the courts will take judicial notice. *Durham v. R. R.,* 108 N. C., 399; *S. v. R. R.,* 141 N. C., 846. At least, if such ordinance has been enacted by the highway commission or contained in any printed pamphlet, there should have been some evidence showing that the ordinance had been duly enacted, or that it had been printed in a pamphlet by authority of the highway commission.

For the error specified, we are of the opinion that the defendant is entitled to a

New trial.

J. M. MOTSINGER v. CYNTHIA HAUSER ET AL.

(Filed 18 April, 1928.)

Limitation of Actions—Evidence—Parol Evidence Not Admissible to Show that Action is Continuation of One Nonsuited—Question of Law.

The question as to whether an action is a continuation of a former one so as to bring it within the provisions of C. S., 415, allowing the same to be brought one year from nonsuit, in relation to the statute of limitations, is one of law to be decided from the original complaint, and when no complaint is filed in the prior action, the identity of the causes of action may not be shown by parol evidence.

APPEAL by plaintiff from *Shaw, J.,* at September Term, 1927, of DAVIDSON.

Civil action for slander and malicious prosecution.

From a judgment of nonsuit, entered on motion of defendants at the close of plaintiff's evidence, the plaintiff appeals.

W. E. Brock and Phillips & Bowers for plaintiff.
A. B. Cummings for defendants.

STACY, C. J. It is conceded that plaintiff's cause of action is barred by the statute of limitations unless the identity of the present suit with one previously entered and nonsuited, in which no complaint was ever filed, can be shown by parol, so as to bring it under the saving provision of the statute allowing a plaintiff, upon payment of costs, to commence a new action within a year after such nonsuit in the original action. C. S., 415. In other words, as no complaint was filed in the first action, so as to enable the court to inspect it and thus determine its character, can the plaintiff show by parol that the present action is but a continuation or renewal of the first, or that it is "the same candle blown out and lighted again"? We think not. The question is one of law for the court on comparison of the pleadings, and not one of fact for the jury. This was the holding in *Young v. R. R.,* 189 N. C., 238, 126 S. E., 600; and on authority of the *Young case,* the present judgment must be upheld.

Affirmed.

GEORGE D. BIZZELL AND L. D. EDWARDS, TRADING AS BIZZELL GROCERY COMPANY, v. N. C. MITCHELL.

(Filed 18 April, 1928.)

1. **Replevin—Right of Action and Defenses—Filing Bond Does Not Admit Grounds of Attachment.**

   By filing a replevy bond for the retention of his property the defendant in attachment does not admit the allegation of fraudulent concealment or other such statutory grounds upon which the attachment was issued. C. S., 814, 815.

2. **Appearance—What Constitutes General Appearance—Filing Replevy Bond.**

   The giving of a replevy bond is equivalent to a general appearance entered by a defendant in attachment, and is a waiver of the irregularities, if any, in the service of summons, or the necessity of such service, and estops the defendant from denying ownership of the property levied on, but it does not estop defendant from traversing the truth of the allegation on which the attachment is based.

3. **Replevin—Right of Action and Defenses—When Motion to Vacate Attachment Can Be Made—Surety's Liability on Replevy Bond.**

   When the defendant in attachment enters a general appearance and traverses the allegations of fraudulent concealment of his property upon which the attachment was based, and gives a replevin bond to retain the possession of the property attached, with the required surety, and upon the trial the issue as to fraud is found in his favor, the surety on the replevy bond is discharged from liability, and it is not necessary that a motion to vacate the attachment be previously made.

4. **Replevin—Judgment—Judgment Against Surety on Replevin Bond Cannot Be Had Summarily.**

   Judgment against a surety on a replevy bond in attachment cannot be ordered in the main action unless he has made himself a voluntary party therein, the ordinary remedy being by separate action against him.

APPEAL by plaintiffs from *Grady, J.*, and a jury, at October Term, 1927, of WAYNE. No error.

This action is brought by plaintiffs against defendant, N. C. Mitchell, to recover a debt for supplies and advances. The action was commenced in Wayne County on 14 September, 1925, and the summons issued to
reene County returnable on 25 September, 1925. It was served on
endant 19 September, 1925. A warrant of attachment was sued out.
affidavit on which it was based alleges the indebtedness and recites
the said N. C. Mitchell keeps himself concealed therein with in-
avoid the service of summons (or) that the said N. C. Mitchell
to assign, dispose of (or) some of his property with intent to
s creditors." The warrant of attachment recites "that the
(N. C. Mitchell) had disposed of, and is about to dispose

of some of his property, with intent to defraud his creditors. You are forthwith commanded to attach and safely keep all the property of the said N. C. Mitchell in your county or so much thereof as may be sufficient to satisfy said demand, with costs and expenses, and you will make due return thereof to the said court at the term to be held on 3 September, 1925." The warrant was issued to Greene County and the property is set forth in the undertaking below.

The defendant's undertaking in attachment is as follows:

"Whereas, by virtue of a writ of attachment issued in the above entitled case on 14 September, 1925, the sheriff of Greene County did seize and levy on the following described personal property belonging to defendant, to wit: Defendant's interest in 35 bales cotton; 15,000 pounds of tobacco, 120 barrels corn, one Ford automobile, eight mules, 4 cows, 1 lot farming implements.

"Now, therefore, we, N. C. Mitchell and H. L. Bizzell, undertake in the sum of $10,000.00 that the said defendant will return the said property to the said officer, if such said officer shall deliver it to him, providing said plaintiffs recover judgment in said action, and pay all costs awarded against him; or in default thereof will pay to said plaintiffs the value of said property and all costs and damages that may be awarded against him in said action. Witness our hands and seals, this 21 September, 1925. N. C. Mitchell, H. L. Bizzell."

The judgment of the court below is as follows: "Present and presiding: Henry A. Grady, judge: This cause coming on to be heard before the court and jury, and the jury having returned the following verdict, to wit:

"1. In what amount, if anything, is the defendant indebted to the plaintiffs? Answer: $2,582.48, with interest from 1 January, 1925.

"2. What was the value of the property levied upon by the sheriff under warrant of attachment? Answer: $3,000 (by consent).

"3. At the time the warrant of attachment was issued, had the defendant kept himself concealed with intent to avoid service of summons? Answer: No.

"4. At the time the warrant of attachment was issued, had the defendant assigned, disposed of, or was he about to assign or dispose of his property with intent to defraud his creditors? Answer: No.

"And it appearing to the court that a warrant of attachment was issued in this cause on or about 14 September, 1925, and that the summons and warrant of attachment were served on the defendant on 19 September, 1925, and that a bond was filed by the defendant under section 813 (C. S., 815) of Consolidated Statutes, with Herbert L. Bizzell as surety thereon, said bond being in the penal sum of $10,000; and it further appearing to the court that no motion was made prior to the trial for the vacating or setting aside of said warrant of attachment; and the defendant having moved pending the trial and before verdict that said warrant be vacated, and having filed affidavits in support of said motion, and no affidavits or evidence having been filed or offered by the plaintiffs in denial of the facts set up in said affidavits, the court finds as a fact that at the time of the issuance of said warrant the defendant was not keeping himself concealed for the purpose of avoiding the service of process, but that the summons was served upon him, and the court finds as a fact that the defendant had not disposed of any of his property, nor was he attempting to dispose of same for the purpose of defrauding his creditors, and that the allegations of the affidavit upon which said warrant was issued were untrue in fact; now upon the findings of the fact above set out, and upon the verdict, it is ordered and adjudged that said warrant of attachment be and the same is vacated and set aside, and the surety on the replevin bond, Herbert L. Bizzell, is discharged from all liability thereon. It is further ordered and adjudged that the plaintiff recover of the defendant, N. C. Mitchell, the sum of $2,582.48, with interest on the same from 1 January, 1925, and the costs of this action to be taxed by the clerk."

J. Faison Thompson for plaintiff.
Kenneth C. Royall for defendant.

CLARKSON, J. The sole question presented on this appeal is H. L. Bizzell, the surety on the undertaking, released? No motion to vacate the attachment having been made before a replevy bond was given, but the jury and the judge each having found as a fact at the trial that no grounds of attachment did exist, was the court in error in vacating the attachment and discharging the surety on the attachment bond? We think not. We decide it here on the theory it was tried in the court below.

We must note in the beginning that this is an attachment proceeding—a provisional or ancillary remedy. We are governed by the statutes on the subject. In approaching the main subject we outline some of the decisions and the statutes applicable in attachments.

It is well settled in this jurisdiction that the findings of fact by the court below in matters of this kind are binding on this Court, if there is competent evidence to support them. *Kenney v. Hotel Co.,* 194 N. C., 44; *Brann v. Hanes, ibid.,* 571. "It is a provisional remedy and as such does not affect the decision of the case upon its merits." *Mohn v. Cressey,* 193 N. C., at page 571.

In an action before a justice of the peace, where the jurisdiction is conferred for the debt: "Want of authority in the justice to issue original process to any county other than his own did not inhibit the running of the warrant of attachment to another county, or the service of a notice upon the garnishee to appear before the court to which the attachment was returnable to answer upon oath as the statute provides; for issuing the warrant was only incidental to the original action." *Mohn case, supra.*

C. S., 814, is as follows: "When the defendant has appeared in such action, he may apply to the court in which it is pending, or to the judge thereof, for an order to discharge the attachment; and if the order is granted, all the proceeds of sale, and moneys collected in the action, and all property attached remaining in the hands of any officer of the court, under any process or order in the action, shall be delivered or paid to the defendant or his agent, and released from the attachment. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may apply in like manner for relief."

C. S., 815, in part, is as follows: "Upon the application provided for in the preceding section the defendant must deliver to the court an undertaking in at least double the amount claimed by the plaintiff in his complaint, executed by two sureties residing in this State, approved by the court, to the effect that the surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking," etc. See, also, C. S., 813.

If the undertaking is not given, provision is made as follows (C. S., 827): "The defendant, or person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, *apply to the court having jurisdiction to vacate or modify the warrant,* or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies." *Byrd v. Nivens,* 189 N. C., p. 621.

Under C. S., 802, "the warrant of attachment may be granted to accompany the summons or at any time thereafter."

The purpose of an attachment is to conserve the property for eventual execution after the action shall have proceeded to judgment. *Mfg. Co. v. Lumber Co.,* 177 N. C., 404; *Hambley v. White,* 192 N. C., p. 31; *Saliba v. Mother Agnes,* 193 N. C., 251. The debtor may procure its release by giving undertaking in the manner provided by the statute *(supra).*

A personal judgment rendered against a nonresident is a nullity, unless he has been served with process or enters a general appearance. *Bridger v. Mitchell,* 187 N. C., 374; *Adams v. Packer,* 194 N. C., 48. If property of a nonresident is attached or brought under control of the court by appropriate process, the court has jurisdiction of the *res* and the judgment extends only to the value of the property. *Adams case, supra.*

The complaint in the present action alleges: "That the said N. C. Mitchell keeps himself concealed therein with intent to avoid the service of the summons (or) that the said N. C. Mitchell is about to assign, dispose of (or) some of his property with intent to defraud his creditors."

The prayer for judgment: "(1) For the sum of $2,917.37, with interest from 23 September, 1925; (2) That this account be declared a specific lien on the property levied on under a warrant of attachment issued in this cause; (3) That the property levied on under this warrant of attachment be condemned to be sold to satisfy this judgment."

The defendant in his answer denies the allegations upon which the warrant of attachment was based. He prays "that the warrant of attachment procured by plaintiff in this action be vacated and dismissed."

The record shows at the beginning of the trial defendant made a motion to vacate the attachment upon affidavits, also issues were submitted to the jury as appears in the record.

6 C. J., sec. 695, p. 337, is as follows: "As a bond for the redelivery or forthcoming of the property, or which does not dissolve or discharge the attachment, will not prevent defendant from moving thereafter to discharge the same, it follows that the giving of such a bond does not bar a subsequent motion or other proceeding by defendant to vacate the attachment, although it has been held that the giving of a forthcoming bond is an admission of the validity of the levy, which estops defendant from moving to quash it. So, also, where the bond does not dissolve the attachment without an order of discharge, the giving of the bond does not preclude defendant from moving to dismiss the attachment, and a replevy bond does not preclude defendant from traversing the truth of the grounds of attachment, or from moving to dismiss the attachment."

6 C. J., sec. 696, at page 338, says: "Where, however, defendant gives a dissolution or discharge bond, or a bond conditioned to perform the judgment, which operates to discharge the attachment altogether, and makes the obligors unconditionally liable, this would seem to render immaterial the validity or even the existence of the grounds on which the attachment was based. As to this, however, the authorities are not uniform, and while the decided weight of authority is in support of the view that the giving of such a bond operates as a waiver on the part of the attachment defendant to move for a dissolution of the attachment thereafter, and estops him to deny the sufficiency of the grounds on which it was issued or the regularity of the proceeding, *the courts of a number of states adhere to the view that defendant may proceed to vacate the attachment notwithstanding the giving of such a bond.*"

6 C. J., sec. 1076, at page 463, in part says: "As to the time of hearing the issues formed upon a plea of abatement or answer traversing the attachment affidavit, the practice is not uniform. In some jurisdictions such issues should be disposed of before the trial of the main action, in other jurisdictions the issue may be tried before a trial on the merits, or may be tried either before or with the main case, while in still other jurisdictions the practice is to try the issue as to the propriety of the attachment together with the issues in the principal action."

It will be noted that under 6 C. J., latter part of section 696, *supra,* it is said: *"The courts of a number of states adhere to the view that defendant may proceed to vacate the attachment notwithstanding the giving of such a bond."*

To substantiate the position, among other cases *Bates v. Killian,* 17 S. C., 553, is cited.

In *Lumber Co. v. Buhmann,* 160 N. C., at page 389, this Court quotes freely from the opinion in the *Bates case, supra,* and says: "When there is any fatal defect in the attachment proceedings, parties would doubtless avail themselves of the chance offered to attack the process and vacate the same, thereby releasing the property from the lien without any further liability. The relief provided by Revisal, secs. 774 (C. S., 814), and 775 (C. S., 815), was without doubt intended primarily to provide for those cases where the attachments are regular and valid, and yet where it would be a hardship to the debtor if he is deprived of the use and enjoyment of his property during the pendency of the action. This remedy respects the interests of both creditor and debtor, as it gives the creditor a security in the form of an undertaking, which is, by the law, considered as reliable as the lien displaced by it, and an adequate protection, while the debtor is restored to the possession of his property. *Bates v. Killian, supra.* It appears that an undertaking was given to the sheriff for the release of the property, but what effect it will ultimately have in securing the plaintiff's claim, if established, is not now before us for decision."

Plaintiffs cite the cases of *Pearre v. Folb,* 123 N. C., 239; *Thompson v. Dillingham,* 183 N. C., 566, to sustain their position. Defendant cites *Mfg. Co. v. Steinmetz,* 133 N. C., 192; *Mfg. Co. v. Lumber Co.,* 177 N. C., 404; *Richardson v. Woodruff,* 178 N. C., 46 at page 50, to sustain his position, and says: "*Pearre v. Folb,* 123 N. C., 239, presents the question of an irregularity in the sheriff's levy; *Thompson v. Dillingham,* 183 N. C., 566, presents the question of an irregularity in the bond (undertaking). The appellant has not cited and, we submit, can cite no case that applies this principle where the question is as to the grounds of attachment; and, as has been previously pointed out, this Court has directly intimated that where an issue is raised as to the grounds of attachment the matter must be adjudicated in the regular manner." In the *Thompson case, supra,* although presenting the irregularity of the undertaking, the Court cites *Moffitt v. Garrett,* 23 Okla., p. 398, and other cases upholding that the giving of the undertaking estops traversing the truth of the affidavit. We take it that the cases cited were on the irregularity of the undertaking. We think giving a bond by the defendant does not waive the validity of the statutory ground upon which the attachment was based.

In the present action, it was based on C. S., 799, sec. 2, which is as follows: "That the defendant is either a foreign corporation or a nonresident of the State, or domestic corporation none of whose officers can be found in the State after due diligence; or, *if he is a natural person and a resident of the State, that he has departed therefrom, or keeps himself concealed therein, with intent to defraud his creditors or to avoid service of summons; or, if the defendant is a natural person or a domestic corporation, that he or it has removed or is about to remove, property from the State, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with like intent.*"

We have come to the crossroads. We believe it is not consonant with justice to hold that giving a bond or undertaking estops a defendant from traversing the grounds on which the warrant was based. To say the least, it was hardly the intent of the act allowing an undertaking to be given that by defendant so doing, to have his property released, he admitted so serious a charge made against him as in the present action. That giving the bond estopped defendant from denying or traversing a charge reflecting on his character. In fact in denying the charge alleged in the complaint, defendant says that it "is utterly unwarranted and an unjustifiable reflection and attack upon defendant's character and business integrity." We think the judgment contemplated in C. S., 815, is not only a judgment establishing the debt, but a judgment establishing the validity of the ground on which the ancillary remedy is procured, when the validity is traversed. We think the reasoning in the *Lumber Co., case, supra,* applicable to the present action. When defendant gives bond the matter may be heard on affidavits before the trial of the main issue but if demand is made it may be heard on an issue before the trial on the merits or it may be tried with the main issue.

See differences in procedure on undertakings in arrest and bail, claim and delivery, injunction and attachment. *Williams v. Perkins,* 192 N. C., p. 175; *Moore v. Edwards,* 192 N. C., 446.

Giving the undertaking by defendant waives certain irregularities. Giving the undertaking is a general appearance in the action. *Abbitt v. Gregory, ante,* 203. Likewise a demurrer is a general appearance. *Reel v. Boyd, ante,* 273.

C. S., 490, is as follows: "A voluntary appearance of a defendant is equivalent to personal service of the summons upon him." It precludes and estops defendant from traversing that he is not the owner of the property seized under the attachment. It does not preclude or estop the defendant from traversing the truth of the allegation on which the attachment is based.

It may be noted that no statute in attachment makes provision for summary judgment on the undertaking. The statute, C. S., 815, *supra,* says: "That the surety will, on demand, pay to the plaintiff," etc. See *Mahoney v. Tyler,* 136 N. C., p. 40; *Williams case, supra.* No summary judgment against the surety, H. L. Bizzell, on the undertaking in the attachment could be rendered in this action. The judgment tendered by plaintiff, appellant, against the surety was properly denied. Of course by consent a surety on an undertaking on attachment can come in and the matter be determined in the one action, otherwise a separate action must be brought on the undertaking.

The principle involved is important and we have considered the matter on its merits. We decide it on the theory on which it was tried in the court below. Under the facts and circumstances of this case, the ground of attachment was traversed, it was found to be false in fact; the undertaking did not admit its truth, therefore the attachment being vacated and set aside, the surety on the undertaking is discharged. We find

No error.

THE BONNETT-BROWN CORPORATION v. C. E. COBLE.

(Filed 18 April, 1928.)

1. State—Relationship to Other States—Force of Judgments of Other States—Defenses Thereto.

A judgment confessed upon a warrant of attorney to that effect, in another State recognizing its validity, will be recognized in the courts of our State under the "full faith and credit" clause of the Federal Constitution, Art. IV, sec. 1, subject to be set aside in a suit thereon brought here, for fraud, or for want of jurisdiction of the court that has rendered it.

2. Same—Evidence.

When an action is brought here on a judgment of a court of foreign jurisdiction recognizing the validity of a warrant of attorney and it appears from an entry of record in the case that the defendant had given the warrant upon which the confessed judgment had been entered, the defendant in the action here on the judgment may set up the defense that in fact he had not executed the warrant of attorney, but its legal effect is a matter of law for the court.

APPEAL by plaintiff from *Barnhill, J.*, at October Term, 1927, of GRANVILLE. New trial.

The plaintiff brought suit on a judgment for $440 purporting to have been given against the defendant in the Municipal Court of Chicago and at the trial introduced in evidence an exemplified transcript of the proceedings, the material parts of which are as follows:

Municipal Court of Chicago.
N C C 20B Transcript of Proceedings.
United States of America.

State of Illinois }
County of Cook, } ss.
City of Chicago. }

IN THE MUNICIPAL COURT OF CHICAGO.

Pleas, proceedings and judgments, before the Municipal Court of Chicago, held in the city of Chicago, in the county of Cook and State of Illinois, at the places in the first district in said city provided by the corporate authorities of said city for the holding of said court in the year of our Lord, 1926, and the Independence of the United States, the one hundred and fifty-first.

Present: Honorable W. Joseph Hill, judge of the city court of Benton, county of Franklin, holding a branch of the Municipal Court of Chicago, at the request of the judges of said municipal court.

ROBERT E. CROWE, *State's Attorney.*
BERNARD W. SNOW, *Bailiff.*

Attest: James A. Kearns, clerk.

Be it remembered, to wit, that on 14 August, A.D., 1926, the following among other proceedings were had in said court and entered of record therein, to wit:

The Bonnett-Brown Corporation,
An Illinois Corporation
v.
C. E. Coble, Doing Business
as *"Public Ledger."*

No. 1805630 CONTRACT CONFESSION.

Now comes the plaintiff in this cause; also comes the defendant; who by virtue of defendant's warrant of attorney filed herein a *cognovit* confessing action of the plaintiff against the defendant and that the plaintiff has sustained damages herein against the defendant in the sum as set forth in said *cognovit.*

Whereupon the plaintiff moves the court for final judgment herein. It is therefore considered by the court that the plaintiff have and recover of and from the defendant, C. E. Coble, doing business as *Public Ledger,* the damages of the plaintiff amounting to the sum of $440.00 in form as aforesaid confessed, together with the costs by the plaintiff herein expended, and that execution issue therefor.

The defendant denied, not only the allegations of the complaint, but the jurisdiction of the court, and testified on the trial that he had never been in Illinois; that no process had been served on him; and that he had neither accepted service, nor employed an attorney to represent him, nor authorized an attorney or any other person to confess judgment in favor of the plaintiff.

The first issue was answered in the negative:

"Was the judgment sued on in this cause rendered by the Municipal Court of the city of Chicago, State of Illinois, upon service of process upon the defendant, or upon his voluntary appearance or confession of judgment?"

Judgment for the defendant; exception and appeal by the plaintiff upon error assigned.

Royster & Royster for plaintiff.
Brummitt & Taylor for defendant.

ADAMS, J. At common law one of the methods of confessing judgment was by means of a written authority directed to one or more attorneys to appear for the party executing it and to receive a declaration for him in an action at the suit of a person named therein, and thereupon to confess the same or to suffer judgment to pass by default. The writing was known as a warrant of attorney. As a rule it was given as security for the obligation upon which judgment was authorized, and the service of process was not essential. *Cuykendall v. Doe,* 3 L. R. A. (N. S.), 449. The practice is now recognized in some of the states and in others it is declared to be contrary to public policy. 3 Freeman on Judgments (5 ed.), sec. 1303. Illinois is one of the states in which the practice is approved. In *Bush v. Hanson,* 70 Ill., 480, the Supreme Court remarked that the entry of judgment by *cognovit* under a warrant of attorney is a proceeding according to the course of the common law, which has been entertained by the courts in the ordinary exercise of their authority as courts of general jurisdiction. It appears from the exemplified transcript of the proceeding that the Municipal Court of Chicago awarded judgment in favor of the plaintiff by virtue of the defendant's warrant of attorney. The judgment recites the *cognovit* as "confessing action of the plaintiff against the defendant" and damages sustained by the plaintiff "in the sum set forth."

If the judgment is valid and effective in Illinois it must be given such faith and credit in the courts of this State as it has by law or usage in the State in which it was pronounced. Constitution United States, Art. IV, sec. 1; *Mills v. Duryee,* 7 Cranch, 481, 3 L. Ed., 411; *Andrews v. Andrews,* 188 U. S., 14, 47 L. Ed., 366; *In re Chase, ante,* 143. We quote an excerpt from the annotation appended to *Egley v. Bennett,* 40 A. L. R. (Ind.), 436, 441, in which quite a number of cases on the subject are cited: "It is established, practically without dissent, that the fact that a judgment of a court of another state was entered under a warrant of attorney to confess judgment executed contemporaneously with the principal obligation, and without service of process or appearance other than that pursuant to the warrant itself, does not take it out of the full faith and credit provision of the Federal Constitution, or disentitle it to the recognition and effect accorded to other judgments of sister states, when asserted as the basis of an action or defense. And this is true whether or not such judgments of that kind are permitted in the State in which the judgment of the sister State is asserted."

The principle thus stated is maintained in 2 Black on Judgments (2 ed.), sec. 868; 13 A. & E. (2 ed.), 1006; *Kingman v. Paulson,* 22 A. S. R. (Ind.), 611; *Teel v. Yost,* 13 L. R. A. (N. Y.), 796; *Bank v. Garland,* 33 L. R. A. (Mich.), 83; *Crim v. Crim,* 54 L. R. A. (Mo.), 502; *Hazel v. Jacobs,* 27 L. R. A. (N. S.), (N. J.), 1066. It should be noted, however, that Article IV, section 1, of the Federal Constitution must be interpreted in connection with other constitutional provisions and certain features of the law. *Old Wayne Mut. Life Asso. v. McDonough,* 204 U. S., 8, 51 L. Ed., 345. The defendant has a right to interpose proper defenses; he may defeat recovery by proof of any fraud practiced in obtaining the judgment which may have prevented him from having an adversary trial of the issue (*Williamson v. Jerome,* 169 N. C., 215), or by showing want of jurisdiction either as to the subject-matter or as to the person of the defendant. *Mills v. Duryee, supra,* and annotation in 3 L. Ed., 412; *Priest v. Board of Trustees,* 232 U. S., 604, 58 L. Ed., 750; *Baker v. Baker* 242 U. S., 394, 61 L. Ed., 386; *Arrington v. Arrington,* 127 N. C., 190; *Irby v. Wilson,* 21 N. C., 568; *Picket v. Johns,* 16 N. C., 123. The answer purports to set up both these defenses, but the allegation of fraud is in reality only a repetition of the other plea. As authority in support of the jurisdiction of the Municipal Court of Chicago the appellant cites *Davidson v. Sharp,* 28 N. C., 14, in which it is said that the regularity of judicial proceedings in another State, according to the laws of that

State, cannot be inquired of here; but *Miller v. Leach,* 95 N. C., 229, is authority for the position that while full faith and credit must be given the judgment, as evidence, so as to preclude inquiry into the merits of the subject-matter, the questions of fraud and jurisdiction are subject to investigation.

With respect to the defendant's challenge of the municipal court's jurisdiction of the subject-matter, it may be said that although as a general rule judicial notice will not be taken of the statutes and laws of other states which may have changed the common law (*Miller v. R. R.,* 154 N. C., 441), still in an action brought on a judgment rendered in another State there arises a presumption of jurisdiction, which of course is subject to rebuttal, if the judgment be that of a court of general jurisdiction. 3 Freeman on Judgments (5 ed.), secs. 1454, 1455, 1459.

The defendant assails, not only the asserted jurisdiction of the subject-matter, but that also of his person, the latter being the defense on which he chiefly relies. The judgment contains this statement: "Now comes the plaintiff in this cause; also comes the defendant; who, by virtue of defendant's warrant of attorney, filed herein a *cognovit* confessing action," etc. It alleges the execution of the warrant of attorney and the consequent rendition of the judgment. This, of course, is subject to explanation; but the testimony in rebuttal should be directed to the recital and not to conclusions drawn therefrom by the witness. The general recital that the defendant appeared is susceptible of explanation and avoidance by showing that the alleged warrant of attorney was not in fact executed. The vital question is whether the defendant signed such a paper. If he did, he authorized confession of the judgment without service of process, and in that event his testimony that he had neither employed an attorney nor authorized any one to confess judgment for him would be in direct contradiction of the written instrument, and moreover, would involve an inquiry into the merits of the subject-matter, which, under *Miller v. Leach, supra,* and many other cases, is expressly forbidden. It was for these reasons, no doubt, that the plaintiff objected to all the defendant's testimony. The legal effect of the warrant of attorney, if executed by the defendant, was a matter, not for him, but for the trial court to determine. It was permissible for him to rebut the recital that he had executed the warrant of attorney, and his testimony should have been addressed to this point; but it was not permissible for him, if he had executed the paper, to testify, as he did, to its legal effect. The answer to the issue, it is true, negatives the defendant's confession of judgment; but, as we have indicated, the answer was based upon incompetent evidence; and for this reason the plaintiff is entitled to a new trial.

New trial.

STATE v. BENNIE BOSWELL ET AL.

(Filed 18 April, 1928.)

Criminal Law—Instructions—Instruction Held Not Expression of Opinion by Trial Court.

Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eye-witnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eye-witnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by C. S., 564.

APPEAL by defendant, Bennie Boswell, from *Daniels, J.,* at October Term, 1927, of GUILFORD. No error.

Indictment for assault with deadly weapon, and for larceny of the sum of $125.00 in money, and of a watch.

From judgment upon a verdict of guilty, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Hines, Kelly & Boren for defendant.

PER CURIAM. In support of the indictment in this action, the State offered as evidence the testimony of L. E. Snider, upon whom the assault is alleged to have been made, and whose property is alleged to have been stolen by defendant and another. It also offered the testimony of J. R. Snider, brother of L. E. Snider, who testified that he was present at the time it is alleged that the crime was committed. In corroboration of the testimony of these two witnesses, the State offered the testimony of other witnesses, who were not present when it is alleged that the assault was made upon L. E. Snider and when his property was stolen.

In his charge to the jury, the judge, after stating in a plain and correct manner the testimony of L. E. Snider and J. R. Snider, said: "Now that is the testimony of eye-witnesses about the offense alleged in the bill of indictment." He then proceeded to state the testimony of the other witnesses for the State, after which he stated the testimony offered by defendants.

Defendant's assignment of error based upon his exceptions to the statement of the judge that the testimony of L. E. Snider and J. R. Snider was the testimony of eye-witnesses, cannot be sustained. They were the only eye-witnesses for the State. Defendant admitted that he was present at the time and place when and where the crime is alleged to have been committed. He denied that either he or his codefendant assaulted the State's witness; both testified that they won the money and watch of L. E. Snider, while gambling with him. The statement of the judge cannot be justly construed as an expression of opinion in violation of the statute. C. S., 564.

The other assignments of error based upon an exception to an instruction in the charge to the jury, and upon an exception, for that the court failed to define in the charge the crime alleged in the indictment, are without merit, and cannot be sustained. The charge contains a clear and correct definition of the crime of larceny. The indictment alleging all the facts which constitute the crime charged therein was read to the jury by the judge in his charge. The issue raised by defendant's plea of "not guilty" involved matters of fact, only. We find no error of law, for which defendant is entitled to a new trial. The judgment is affirmed.

No error.

STATE v. CLAY IDOL.

(Filed 18 April, 1928.)

Criminal Law—Evidence—Character Evidence—Admissibility and Effect.

If a defendant testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence should affect only his credibility as a witness. *S. v. Nance, ante,* 47; *S. v. Colson,* 193 N. C., 236.

CRIMINAL ACTION before *MacRae, Special Judge,* at January-February Term, 1928, of GUILFORD.

The defendant was indicted for transporting and possessing intoxicating liquors. The evidence tended to show that the defendant and two companions, to wit, Wharton and Hobson, were transporting whiskey in an automobile. The defendant was convicted and sentenced to the roads for a term of one year. From judgment rendered he appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Allen Adams for defendant.

PER CURIAM. The defendant testified in his own behalf but offered no testimony as to his good character. The State offered evidence of the bad character of the defendant. Thereupon, the judge charged the jury as follows:

"Now, there is some character evidence introduced. Witnesses testified that the character of Wharton is bad and the character of the defendant is bad, and some testimony as to Hobson's record in the court. The court charges you that you will receive this character testimony and consider it both as substantive evidence, that is, as having weight—in its bearing on whether or not the defendant committed the act with which he is charged, and as evidence relating to the credibility of the witnesses Wharton and the defendant."

The exception to the foregoing charge is sustained.

"If a defendant testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence should affect only his credibility as a witness." *S. v. Nance, ante,* 47; *S. v. Colson,* 193 N. C., 236.

Assistant Attorney-General Nash, with his usual candor, confesses error.

New trial.

JAMES W. MARSHALL v. WILLIAM M. HAMMOCK AND MARY HAMMOCK DISHER.

(Filed 25 April, 1928.)

1. **Trusts—Resulting Trusts—Husband and Wife.**

A trust is engrafted on the title of the husband in favor of the wife when he has acquired lands by deed taken to himself with money belonging to her separate estate.

2. **Equity—Laches—In Suit to Declare Resulting Trust.**

Where the plaintiff as heir at law of his mother seeks to engraft a trust in her favor on the title to lands taken by his step-father, and purchased with the money belonging to her, as against the children of his mother's second marriage, and it appears that the *locus in quo* had been divided between the children of both marriages by proceedings for partition as tenants in common, and the plaintiff had purchased for a valuable consideration a part of the lands so allotted to another of the tenants, and the lands were thereafter so held peaceably and adversely for more than ten years, C. S., 445, and for the same period of time after the trust had been disclaimed by the alleged trustee: *Held,* the plaintiff is estopped by his laches from claiming an undivided interest in the tract as the heir at law of his deceased mother.

3. **Property—Title to Real Property Not Affected by Acquiescence—Doctrine Not Applicable in this Case—Statute of Limitations.**

Held: under the facts of this case, the general statute of limitations, C. S., 445, being applicable to the plaintiff's right of action to declare a trust, the principle that acquiescence cannot confirm a title has no application.

APPEAL by plaintiff from *Shaw, J.,* at February Term, 1928, of FORSYTH. Affirmed.

The plaintiff was the only child of his mother and his father James W. Marshall, Sr. After his father's death his mother married George W. Hammock, and of this union two children were born, namely, the defendant Mary Hammock Disher and John Hammock, deceased, who left the defendant William M. Hammock, as his only child and heir at law.

The plaintiff's evidence tended to show that Martha Jane Marshall Hammock, mother of the plaintiff, at one time owned in fee a tract of land containing about 42 acres, which she had acquired by the partition of the real property of her father, Archibald Fulp; that on 27 July, 1869, she and her husband, George W. Hammock, conveyed this land to Joseph Fulp in consideration of $400, which was paid to her husband; that this money was used in the purchase from J. P. Whicker of another tract containing 38 acres, the subject of this controversy, the title to which was taken in the name of George W. Hammock.

Martha Jane Marshall Hammock died in 1906. George W. Hammock, her husband, died on 14 March, 1926, leaving a will by which he gave to the plaintiff the sum of $50 and to the defendants all his other property, real and personal. In 1912 he executed a deed to the plaintiff for a part of the 38-acre tract described in the deed from J. P. Whicker and wife, dated 2 November, 1869. On 4 May, 1927, the plaintiff brought suit for partition and afterwards by amendment to his complaint sought to have the legal title to the land impressed with a trust for the benefit of the plaintiff as the heir at law of his mother.

At the close of the evidence the action was dismissed as in case of nonsuit by the Forsyth County Court; the plaintiff excepted and appealed to the Superior Court and the motion was again allowed. Exception and appeal by the plaintiff on error assigned.

Richmond Rucker and John J. Ingle for plaintiff.
W. L. Morris and Manly, Hendren & Womble for defendants.

ADAMS, J. On 2 November, 1869, J. P. Whicker and his wife conveyed the land in controversy to George W. Hammock, the second husband of the plaintiff's mother, and acknowledged payment of the purchase price by the grantee therein named. The deed was registered 13 January, 1870. The plaintiff alleged that the land had been paid for with his mother's money and that George W. Hammock held the legal title in trust for her during her life and thereafter until his death for her heirs at law. The case was tried upon this theory, the plaintiff contending that after the death of his mother, George W. Hammock was in possession of the land as tenant by the curtesy; that upon the death of Hammock the defendants took exclusive possession; and that he is the owner of a one-third undivided interest in the land and is entitled to partition. The defendants contest the plaintiff's right to the relief sought on two grounds: (1) The complaint, having no allegation which negatives laches, is subject to demurrer *ore tenus;* (2) the cause of action is barred by laches and by section 445 of Consolidated Statutes.

The plaintiff offered evidence which, standing alone, is sufficient to call for an application of the equitable principle that if land is purchased with funds arising from the separate estate of the wife or with funds which by agreement of the husband are to be treated as such separate estate and title is taken in the name of the husband, the transaction raises a resulting trust in favor of the wife; and, nothing else appearing, the intervention of the jury would be necessary. *Tyndall v. Tyndall,* 186 N. C., 272; *Harris v. Harris,* 178 N. C., 7. But a verdict is not essential if the complaint is fatally defective, or if upon the admitted or undisputed evidence the action is barred either by the statute of limitations or by operation of the equitable doctrine of laches.

Equity aids the vigilant, not those who sleep on their rights. This is one of the several maxims of equity which form a component part of its jurisprudence. It is designed to promote diligence and to punish remissness or unreasonable delay in asserting a claim or moving for the enforcement of a right. Differently expressed, it embraces the defense of laches, which is often pleaded and enforced in bar of suits which are prosecuted in courts of equity. Its function is to safeguard peace and security; it therefore does not encourage stale claims or antiquated demands. The reason is obvious. The redress of a wrong or the enforcement of a right should not be delayed until the facts are involved in doubt and uncertainty. It was *Chief Justice Ruffin* who remarked (in a dissenting opinion in *Hill v. Jones,* 17 N. C., 104) that reasonable diligence is the best evidence of good faith and a just cause, and that we are obliged to distrust him who prefers his claim at a great interval after its origin. *Capehart v. Mhoon,* 58 N. C., 178; *Pender v. Pittman,* 84 N. C., 372; *Spencer v. R. R.,* 137 N. C., 107, 127; *Butler v. Bell,* 181 N. C., 85, 90.

A court of equity will usually have regard to a statute of limitations (*Taylor v. McMurray,* 58 N. C., 357), but the lapse of time may constitute a defense in equity even when no statute is controlling. *McAden v. Palmer,* 140 N. C., 258; Bispham's Prin. Eq., sec. 59. If a case does not fall within the operation of the statute of limitations no definite period is fixed within which a right must be asserted or else be barred by laches; and in the absence of a positive rule the question is addressed to the sound discretion of the chancellor and must be determined according to the circumstances developed in each case. 21 C. J., 212 *et seq.*

Let us grant the plaintiff's contention that his mother's money was given for the land in suit; that her husband held the legal title for her benefit as the trustee of a resulting trust; that as husband and wife they lived on the land until her death in 1906; that, as held in *Spence v. Pottery Co.,* 185 N. C., 218, the husband's possession was that of the wife also; and that time did not begin to run during the life of the plaintiff's mother. With these admissions two principles are to be considered. (1) A person may preclude himself from asserting a right by abandoning it, or by acquiescence in its enjoyment by another under circumstances which are inconsistent with his own claim or demand. *Stith v. McKee,* 87 N. C., 389; *Mask v. Tiller,* 89 N. C., 423. (2) As a rule lapse of time is not a bar as between trustee and *cestui que trust,* but if the former, with knowledge of the latter disclaims the trust either expressly or by acts which necessarily imply a disclaimer, and unbroken possession follows in the trustee or in those claiming under him, for a period equal to that prescribed in the act of limitation to constitute a bar, the lapse of time under such circumstances may be relied upon as a defense. *Coxe v. Carson,* 169 N. C., 132. In the present case there is evidence to which each of these principles may be applied. Even if the plaintiff regarded Hammock's occupation of the land as that of a tenant by the curtesy, this circumstance did not prevent him from invoking, at any time after his mother's death, the equitable jurisdiction of the court to have Hammock declared a trustee. *Sprinkle v. Holton,* 146 N. C., 258, 265. Since early childhood he had known of his mother's claim; at her death, when his cause of action arose, he was advanced in years; but he declined to bring suit to enforce his right during Hammock's life. After Hammock's death, which occurred when twenty years had passed, he instituted the present action. Meantime, on 25 April, 1912, Hammock had executed and delivered to him and he had accepted a deed with the usual covenants of warranty conveying a small part of the 38-acre tract for which he had paid a valuable consideration. The distinguishing features of this transaction were Hammock's repudiation of the trust and the plaintiff's acquiescence in the adverse claim of title. This position is not modified by saying that Hammock conveyed the interest of a tenant by the curtesy. Evidently the plaintiff expected Hammock to leave a will devising him a part of the property. He testified that he would have been satisfied with eight acres on the back side of the tract: "that was the land I expected to get under George W. Hammock's will." His conception of his relation to the trustee is thus indicated. His title was to be derived, not from his mother by descent, but from Hammock by devise; so the result was not affected by any declarations Hammock may have made after the execution of his deed to the plaintiff. The doctrine that acquiescence cannot confirm a title has no application to statutes of limitation or to kindred statutory provisions in regard to the abandonment or release of rights legal or equitable. *Davis v. Cotton,* 55 N. C., 430.

Six years after the plaintiff's cause of action had accrued he accepted Hammock's deed for a part of the disputed land; he delayed his suit for a declaration of the trust almost fourteen years thereafter; then after Hammock's death he sought to set up the fiduciary relation. Under the conditions disclosed by the evidence, his claim is without merit. Whether he was not informed as to the legal effect of delay is not material. We have held that an action to have a party declared a trustee is barred by the lapse of ten years. *Hospital v. Nicholson,* 190 N. C., 119; *Sexton v. Farrington,* 185 N. C., 339. And that the plaintiff cannot profit by a misconception of his rights is equally clear: as the Court said in *Williams v. Harrell,* 43 N. C., 123, "there is no saving clause for those who are ignorant, uninformed, in humble circumstances, and who neglect to consult counsel."

Under the former practice an objection that the plaintiff's equity was barred could be taken by demurrer; under the present practice it may be taken by a motion to dismiss the action. *Williams v. Harrell, supra; Worth v. Gray,* 59 N. C., 4.

Our view of the case dispenses with the necessity of deciding whether the complaint is defective because it contains no averment purporting to negative the plaintiff's laches in asserting his alleged equity. On this question the following authorities may be consulted: 4 Pomeroy's Eq. Jurisprudence, sec. 1457; *Badger v. Badger,* 2 Wallace, 87, 17 L. Ed., 836; *Hays v. Seattle,* 251 U. S., 233, 64 L. Ed., 243; *Coxe v. Carson, supra.* The judgment is

Affirmed.

LESS LIPSCOMB v. G. H. COX AND H. C. PERKINS, TRADING AS COX & PERKINS.

(Filed 25 April, 1928.)

Trial—Polling Jury—When Poll Should be Taken—Verdict—New Trial.

The verdict of the jury should be free from outside influence, and when a poll of the jury is demanded, it should be made upon the return of the verdict and before debate or discussion upon the merits or upon a motion to set aside the verdict; but when the verdict is rendered under a mistake as to the effect of an answer to one of the issues, a new trial will be ordered.

CIVIL ACTION before *Stack, J.,* at November Term, 1927, of FORSYTH.

The plaintiff instituted an action against the defendants in the Forsyth County Court to recover damages for personal injury sustained through the negligence of the defendants. The defendants denied all the allegations of negligence made by the plaintiff and pleaded contributory negligence of the plaintiff as a bar to recovery. Issues of negligence, contributory negligence and damages were submitted to the jury. The jury answered the issues of negligence and contributory negligence in the affirmative and did not answer the issue of damages. There was judgment for the defendants upon the verdict in the county court and the plaintiff appealed to the Superior Court. The trial judge in the Superior Court sustained certain assignments of error made by the plaintiff with reference to the verdict, awarded a new trial and remanded the cause to the county court. The defendants appealed to this Court, assigning errors.

The record discloses certain findings of fact made by the trial judge of the county court. These findings are substantially as follows: The jury returned to the court room, entered the jury box, and a juror, purporting to act as foreman, handed the issues to a deputy sheriff in attendance upon the court. The deputy sheriff handed the paper-writing to the trial judge, who instructed the deputy to hand the paper to the clerk. Upon arrival of counsel for the parties the court instructed the clerk to take the verdict. The clerk arose and took the verdict in the usual manner by asking the jury if they had agreed upon a verdict; whereupon one of the jurors, purporting to act as foreman, announced that they had; that thereupon the clerk asked the jury if they answered the first issue yes, the second issue yes, and did not answer the third issue, and if that was their verdict? Whereupon, one of the jurors, purporting to act as foreman of the jury, answered yes; that there was no negative reply by any of the jurors. The court then thanked the jury for their attendance upon the court, told them that they might be discharged for the term and prove their attendance before the clerk. Immediately, and before the jury had left the jury box, counsel for plaintiff addressed the court, stating that if the jury had gained the impression that the second issue could be answered in the affirmative and yet damages be awarded that a wrong had been done, and thereupon moved to set aside the verdict as contrary to the weight of evidence, stating to the court in the presence of the jury, "I believe if the members of the jury could now express their views, they did not mean to deprive the plaintiff of recovering all compensation for his injuries." The trial judge stated to counsel for plaintiff that he could not take official notice of the fact or find as a fact that the jury did misconstrue the issue. Counsel for plaintiff then stated that by reason of certain questions asked by jurors when the jury had returned for further instructions, that he thought that the jury was of the opinion that the plaintiff had been damaged through the negligence of defendants and was entitled to compensation and that they had become confused on the second issue and answered that issue "yes" as a matter of compromise. Counsel further states: "If the jury has made a mistake and rendered a verdict contrary to their own impressions, that is simply a miscarriage of justice." Whereupon, the court of its own motion directed the clerk to poll the jury. The clerk proceeded to call the name of the first juror and an argument then ensued between the juror and the court, the juror stating "there has been some argument going on since we have gotten out here," and continued to ask the judge whether or not he desired to know what the verdict of the jury was while they were in the jury room or since they had come into the court room. The juror further stated that it was his understanding if both issues were answered "yes," that the court would fix the amount of damages. After further argument between the court and the jury, the court commanded the jurors to answer the question propounded by the clerk, yes or no. Whereupon, seven jurors stated that the verdict as rendered was still their verdict and five of the jurors dissented, stating that the verdict as rendered was not their verdict. Thereupon the judge ordered the jury to retire to the jury room and give further consideration to the case. After the jury retired there was further argument between counsel for both parties and the court. After the jury had been out for about thirty minutes the trial judge sent for the jury, took the issues from them, and as it appeared the issues had not been changed in any way since the jury had retired, ordered the clerk to record the issues as the verdict of the jury, and thereupon rendered judgment in favor of defendants.

The court finds as follows: "The court is further of the opinion that any discrepancy between the verdict heretofore referred to and the poll of the jury, as set out in the proceedings had, was influenced by remarks made by counsel for the plaintiff in the presence of the jury, and from the statements of the jurors made during the poll of the jury. The court finds as a fact that any discrepancy existing between the verdict and the poll of the jury was due to remarks made by counsel heretofore referred to." The court further held as a matter of law that the verdict tendered before the poll of the jury was the unanimous verdict of the jury.

As heretofore stated, the plaintiffs appealed to the judge of the Superior Court, assigning as error the holding of the judge of the county court that a unanimous verdict had been rendered.

Archie Elledge and Fred M. Parrish for plaintiff.
Manly, Hendren & Womble for defendants.

BROGDEN, J. When must the poll of a jury be taken? The right of either party to poll the jury in both criminal and civil actions is firmly established by the decisions in this State. The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the "unanimous verdict of a jury of good and lawful men in open court," as prescribed by the Constitution, Art. I, sec. 13, for criminal causes. One of the first cases dealing with the subject is *S. v. Young,* 77 N. C., 498. The Court held: "When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: 'So, say you all.' At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual." It is held to the same effect *In re Sugg,* 194 N. C., 638: "The right to poll the jurors is recognized, in order that it may be ascertained whether or not the verdict as tendered is the unanimous decision of the jurors. If it is found by such poll that one juror does not then assent to the verdict as tendered, such verdict cannot be accepted, for it is not as a matter of law the unanimous decision of the jury." In *Trantham v. Furniture Co.,* 194 N. C., 615, the Court said: "The verdict of a jury is sacred. It should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever." The decisions of this State establish the principle that the verdict of a jury, to be effectual, must be free from outside influence of whatsoever kind or nature. *Wright v. Hemphill,* 81 N. C., 33; *Petty v. Rousseau,* 94 N. C., 362; *Mitchell v. Mitchell,* 122 N. C., 332; *Lumber Co. v. Lumber Co.,* 187 N. C., 417; *Alston v. Alston,* 189 N. C., 299.

The trial judge found "that any discrepancy existing between the verdict and the poll of jury was due to remarks made by counsel heretofore referred to." The jurors were not asked as to whether the verdict tendered was their verdict before the discussion took place in open court between counsel and the judge. If it had appeared that the verdict as tendered was the verdict of the jury upon its return to the court room and that five members of the jury had changed their minds since the discussion, then certainly the verdict tendered as a matter of law should be upheld. But this essential fact does not appear. Indeed the colloquy between one of the jurors and the trial judge would indicate that the issue as to contributory negligence was answered by some members of the jury under a mistake of fact, to wit, that if the second issue was answered "yes," the court would fix the compensation to be awarded the plaintiff. Verdicts, in order to inspire confidence in the integrity of the courts, must at all times be above suspicion, and in this uncertain state of the record we are constrained to hold that a new trial should be awarded.

However, it should be clearly understood that the right to poll a jury can be waived, *S. v. Toole,* 106 N. C., 736, and that the poll of the jury must be had immediately upon the return of the verdict in open court and before debate or discussion thereof, or debate or discussion of the merits of the case upon motion to set aside the verdict or otherwise. Unless this procedure is strictly observed by trial judges, it is quite evident that a poll of a jury, after spirited discussion of the verdict, or of the merits of the case, in the presence of a jury, would result in confusion and uncertainty, and thus retard and impair the due administration of the law.

Affirmed.

STATE v. T. B. JOHNSON.

(Filed 25 April, 1928.)

False Pretense—Nature of Crime—Evidence of Fraudulent Intent—Endorsing Negotiable Instrument.

In order to constitute false pretense in the discounting a note at the bank by a maker upon misrepresentation to one of the endorsers that he had secured certain endorsers with him, when, in fact he had used the note without other endorsers, evidence that the maker had turned over to the endorsers on the note his entire stock of merchandise and that he had thereupon had a civil judgment in their favor canceled of record, is material and competent upon the element of intent necessary to constitute the offense charged, and it is reversible error for the judge to reject evidence to this effect. C. S., 4278.

CRIMINAL ACTION before *Harding, J.,* at November Term, 1927, of DAVIDSON.

The defendant was indicted for false pretense. The evidence tended to show that on or about 15 September, 1925, the defendant approached the prosecuting witness, Dr. R. L. Reynolds, and requested him to endorse a note for the sum of $3,000.00, stating to said Reynolds that certain other parties had agreed to sign the note also.

Reynolds testified as follows: "When he came in and wanted this note signed he told me he had seen these fellows and they agreed to sign it and I told him I would sign the note with the understanding that all those fellows were on that note before he put it in the bank, and he said he would see they were all there and he was going to fill it out with the names before he put it in the bank, and with that understanding I signed the note that he got their names on it before he put it in the bank and that they had already agreed to sign it."

George Curry, who was one of the parties referred to by the defendant, signed the note, and the defendant placed the note in the bank with no signature thereon except that of Curry.

The defendant denied that he had stated to the prosecuting witness that he would secure the names of other parties except Curry and proposed to show upon the question of fraudulent intent that a renewal note was signed by the prosecuting witness and Curry, and that after the giving of said renewal note the defendant confessed judgment in favor of the prosecuting witness and of said Curry in the sum of $3,000.00, and in satisfaction of said judgment executed a bill of sale for his entire stock of goods, valued at $16,000.00, to said Reynolds and said Curry, and the attorney for said Reynolds thereupon marked the judgment satisfied and paid in full; that thereafter Reynolds and Curry took over the defendant's entire business but that the business was not a success and failed. Thereafter in March, 1927, the prosecuting witness Reynolds issued a warrant for the defendant, charging him with false pretense under C. S., 4278. The defendant was convicted and sentenced to be confined in the State's prison, for a term of two years, to be assigned to hard labor and to wear stripes. The defendant appealed, assigning error.

Phillips & Bowers and H. R. Kyser for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. It has been held in *S. v. Gibson,* 169 N. C., 318, that it is an indictable offense under C. S., 4278, to procure a person to sign or endorse a note by means of false representation and with intent to cheat and defraud.

The constituent elements of the offense of false pretense are: (1) That the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. *S. v. Carlson,* 171 N. C., 818.

The intent to defraud is one of the essential elements of the crime. *S. v. McDonald,* 133 N. C., 680. Thus in *S. v. Garris,* 98 N. C., 735, the Court said: "The essence of the indictment is in the imputed intent to deceive and defraud, and thereby to obtain the goods of the defrauded owner. Unless this intent exists, and is found, the offense is not committed, and can only be inferred from acts and declarations, and especially from such as occurred at the time of the committing of the alleged fraud. Whatever tends to show that the person charged acted under a misapprehension tends to repel the imputation, and becomes competent upon this inquiry. Much latitude must therefore be allowed in the reception of evidence bearing upon the issue of an intent to deceive and defraud, and we are not disposed to deny the competency of the rejected evidence, so far as it bears upon this point, and is not intended to vary or modify the terms of the written instrument." In *S. v. Walton,* 114 N. C., 783, prior and subsequent transactions are held competent upon the question of intent. *S. v. Murphy,* 84 N. C., 742.

The defendant contended that the testimony showing that he confessed judgment upon said note and thereafter executed and delivered a bill of sale to the prosecuting witness and the other endorser of said note and turned over and delivered the property to them, was competent and admissible upon the question of his intent to defraud. In our opinion this contention is sound and the evidence should have been admitted. We do not interpret the evidence so rejected as a mere attempt to reimburse the prosecuting witness. So far as the record discloses the judgment was confessed and the property turned over to the prosecuting witness, and the judgment canceled long before there was any suggestion of a criminal offense.

Upon the whole record, we are of the opinion that the defendant is entitled to a new trial, and it is so ordered.

New trial.

GENERAL MOTORS ACCEPTANCE CORPORATION v. D. F. MAYBERRY, RECEIVER; TURNER MOTOR COMPANY, INC., AND THE FIRST NATIONAL BANK.

(Filed 25 April, 1928.)

1. **Receivers—Title to and Possession of Property—Conditional Sales—Registration—Vendor and Purchaser—Sales.**

A receiver represents creditors of an insolvent corporation, and while a conditional sale to the corporation does not require registration as between the parties, after the receivership its validity as to the rights of creditors depends upon its registration in conformity with C. S., 3311, 3312.

2. **Sales—Conditional Sales—Contracts Construed as Conditional Sales.**

Where the vendor of personalty ships to itself as consignee, order notify the purchaser, and the latter has received money from another with which to pay the draft and obtain the goods from the common carrier, under an agreement that the title to the goods shall vest in such third person until the goods are paid for, the effect of the contract is a conditional sale, falling within the meaning of C. S., 3311, 3312.

3. Same—Construction—Question of Law.

Whether or not a written contract between the purchaser and vendor is a conditional sale is a matter of legal construction of the contract.

4. Sales—Conditional Sales—Title to and Possession of Property—Proceeds from Sale of Property Held Under Conditional Sale.

Where the purchasing dealer corporation to be notified in shipment of certain automobiles with draft attached has obtained money from a credit corporation with which to pay the draft and obtain the goods, and has taken the automobiles into its possession under a written agreement for the lender of the money to retain title until the sale of the automobiles, and having sold some of them it has obtained a cashier's check payable to the lender's order, which with the unsold automobiles goes into the hands of its receiver, later appointed: *Held*, while the title to the automobiles is not good as against creditors without registration, the moneys realized from the payment of the cashier's check is that of the lending credit corporation, unaffected by the creditor's claims on the drafts of the insolvent corporation in the receiver's hands.

5. Receivers—Title to and Possession of Property—Proceeds from Sale of Property Held Under Conditional Sale.

Where a corporation purchasing goods under a contract reserving title in the vendor, has sold some of them, and has obtained cashier's checks for the proceeds, payable to the order of the owner of the title, and afterwards becomes insolvent and is put in a receiver's hands, the receiver in possession of the checks acquires no better title than his insolvent corporation, and the proceeds are the property of the owner of the title.

APPEAL by both plaintiff and defendants from *Stack, J.*, at November Term, 1927, of ROCKINGHAM. No error.

Action to recover two automobiles and two cashier's checks, all of which were in the possession of defendant, D. F. Mayberry, receiver, at the date of the commencement of this action.

Prior to the appointment of the said D. F. Mayberry as receiver of the Turner Motor Company, the said automobiles were in the possession of said company. They had been delivered to said company by the plaintiff, under and pursuant to the terms of a contract between the plaintiff and said company.

The cashier's checks were issued, at the request of the Turner Motor Company, prior to the receivership, by the First National Bank of Reidsville, N. C., and are payable to the order of the plaintiff. They were paid for by the Turner Motor Company, with money which it had received from sales of automobiles in its possession by virtue of a contract with plaintiff, and were delivered by the bank to said company. These checks have never been in the possession of plaintiff, nor have they been endorsed by plaintiff. They were in the possession of the Turner Motor Company from the date of their issue until they came into the possession of D. F. Mayberry, receiver.

Upon his appointment and qualification as receiver, the defendant, D. F. Mayberry, took said automobiles and said cashier's checks, which were then in the possession of the Turner Motor Company, into his possession as assets of said company. Since the commencement of this action, the defendant bank has redeemed the cashier's checks, issued by it, and payable to the order of plaintiff, by paying the amount thereof to the said receiver, who now holds the money received for said cashier's checks as assets of the Turner Motor Company. Both the automobiles and the cashier's checks were taken from the possession of the defendant, D. F. Mayberry, receiver, under a writ of claim and delivery issued in this action, but were subsequently returned to him, upon his executing and filing an undertaking as provided by statute.

The issues submitted to the jury were answered as follows:

1. Is the plaintiff the owner and entitled to the possession of the two automobiles described in the complaint? Answer: No.

2. What was the value of said automobiles at the time of the receivership? Answer: $1,540 (by consent).

3. Is the plaintiff the owner and entitled to the possession of the two cashier's checks described in the complaint, or of the proceeds thereof? Answer: Yes.

From judgment on the verdict, both plaintiff and defendants appealed to the Supreme Court.

Shuping & Hampton, King, Sapp & King for plaintiff.

W. R. McCargo, F. E. Hester and Glidewell, Dunn & Gwynn for defendants.

CONNOR, J. The evidence pertinent to the first issue, involving title to the two automobiles described in the complaint, tends to show the facts to be as follows:

On 10 May, 1926, the Olds Motor Works, a corporation, executed a bill of sale, by which for a valuable consideration, it sold and delivered to plaintiff, General Motors Acceptance Corporation, four automobiles, each of which is described therein. The invoice price of said four automobiles, as stated in the bill of sale, is $3,197.71.

The four automobiles described in the bill of sale, were shipped, at the request of the plaintiff, by the Olds Motor Works to the Turner Motor Company, a corporation, organized under the laws of the State of North Carolina, and doing business as a dealer in automobiles at Reidsville, N. C. The bill of lading under which the automobiles were shipped was issued to the Olds Motor Works, as shipper; the Olds Motor Works was also named therein as the consignee, at Reidsville, N. C.; the bill of lading was, however, endorsed, "Notify the Turner Motor Company." The automobiles were delivered to the Turner Motor Company, at Reidsville, N. C., by the railroad company upon the surrender to it of the bill of lading by the Turner Motor Company.

Before the delivery of the said automobiles to it by the railroad company, the Turner Motor Company, at Reidsville, N. C., on 18 May, 1926, executed its promissory note, payable to the order of plaintiff, three months after date, for the sum of $2,872. This note, together with a sum in cash, was delivered by the Turner Motor Company to plaintiff, at the time the bill of lading for the automobiles was received by the said company. The evidence does not show the amount of cash delivered by the Turner Motor Company to plaintiff—whether, if added to the amount of the note, the sum will equal or exceed the invoice price of the automobiles as stated in the bill of sale, executed by the Olds Motor Works to plaintiff. It does show that a sum of money was deposited by the Turner Motor Company with plaintiff in connection with the transaction, and that it was agreed at the time of such deposit that said sum of money might be applied for reimbursement for any expense incurred by plaintiff, in the event of a breach of the contract by the Turner Motor Company.

Contemporaneously with the execution of its note payable to the order of plaintiff, the Turner Motor Company executed and delivered to the plaintiff a paper-writing, called a "Trust Receipt." It thereby acknowledged the receipt by it from the General Motors Acceptance Corporation of the four automobiles described in the bill of sale executed by the Olds Motor Works to said corporation. The terms upon which the said automobiles were received by the Turner Motor Company, as set out in said trust receipt, are as follows:

"I (we) hereby acknowledge that said motor vehicles are the property of the said General Motors Acceptance Corporation, and each agree to take and hold the same, at my (our) sole risk as to all loss or injury, for the purpose of storing said property; and I (we) hereby agree to keep said motor vehicles brand new, and not to operate them for demonstration or otherwise, except as may be necessary to drive said motor vehicles from freight depot or from above city to my (our) place of business with all due care, at my (our) risk en route against all loss or damage to said motor vehicles, persons or property, and to return said motor vehicles to said General Motors Acceptance Corporation or its order upon demand; and to pay and discharge all taxes, incumbrances and claims relative thereto, I (we) hereby agree not to sell, loan, deliver, pledge, mortgage or otherwise dispose of said motor vehicles to any other person, until after payment of amount shown in release orders or like identification number herewith. I (we) further agree that the deposit made by me (us), in connection with this transaction, may be applied for reimbursement for any expense incurred by General Motors Acceptance Corporation in the event of breach of this trust, or repossession of said motor vehicles."

On each of the three paper-writings offered in evidence, to wit: the bill of sale executed by the Olds Motor Works to plaintiff, the note executed by Turner Motor Company to plaintiff, and the trust receipt executed by Turner Motor Company to plaintiff, the following words appear: "Identification No. 220228F. Always quote this number when reporting." Neither of said paper-writings was registered in Rockingham County, or elsewhere. Two of the automobiles described in the bill of sale and in the trust receipt were sold by the Turner Motor Company prior to the appointment of D. F. Mayberry as its receiver; the other two were in the possession of the said receiver, when this action was begun, and are the identical automobiles described in the complaint.

With respect to the first issue, the court charged the jury that if they believed the evidence pertinent thereto, and found therefrom the facts to be as the said evidence tended to show, they would answer said issue, "No."

Plaintiff excepted to this instruction, and assigns same as error. The question presented for decision by this assignment of error is whether the trust receipt, construed in connection with the bill of sale and the note offered in evidence, is such an instrument as is required by C. S., 3311 or C. S., 3312, to be registered in order to be valid as against creditors of, or purchasers, for a valuable consideration, from the Turner Motor Company. It may be conceded that as between plaintiff and the Turner Motor Company, plaintiff, upon all the evidence, is the owner, at least, of the legal title to said automobiles, and as such owner is entitled to the possession of the same; it does not follow, however, that, upon all the facts shown by the evidence in this case, plaintiff is the owner of said automobiles as against the defendant, D. F. Mayberry, receiver of the Turner Motor Company, an insolvent corporation. As such receiver, said defendant not only takes such title to all the property of said company, which passed into his hands as assets of the company, as said company had at the date of his appointment; he also represents creditors of said company. No title to property which has passed into his hands as receiver, not valid as to such creditors, is good as against him. Such property cannot be recovered from said defendant, by one who claims under a title thereto which is invalid as to creditors of, or as to purchasers, for a valuable consideration, from the Turner Motor Company. *Observer Co. v. Little,* 175 N. C., 42.

Therefore, if the title under which plaintiff claims the two automobiles described in the complaint is, upon all the facts shown by the evidence, invalid as against creditors of the Turner Motor Company, plaintiff is not entitled to recover said automobiles from defendant, D. F. Mayberry, receiver, and its assignment of error, based upon its exception to the instruction of the court to the jury, with respect to the first issue, cannot be sustained.

In order to determine the nature of the trust receipt, offered in evidence in this case, and the relation of the parties thereto, with respect to each other, and with respect to the automobiles described therein, as established by the contract between them, the trust receipt must be construed in connection with the bill of sale and also in connection with the note executed by the Turner Motor Company. All three papers manifestly relate to one and the same transaction. They must, therefore, be construed together in order to determine what the transaction was. *Sneeden v. Nurnberger's Market,* 192 N. C., 439. Each of these papers bears the same identification number; each was executed in contemplation of the execution of the others. Under the bill of sale executed by Olds Motor Works, plaintiff became the owner of the four automobiles; as such owner, it caused the said automobiles to be shipped and delivered to the Turner Motor Company, first taking from said company its note, payable to the order of plaintiff, for the sum of $2,872, and at the same time requiring said company to execute the trust receipt. The automobiles were delivered by plaintiff to the Turner Motor Company under the terms of a contract, whereby the Turner Motor Company, upon payment of its note to plaintiff, should acquire the title to said automobiles retained by plaintiff until such payment was made. Notwithstanding the form of the contract, or the language used by the parties thereto in the trust receipt, stating its terms, certainly insofar as it affects creditors of either party, the transaction is a conditional sale. *Trust Co. v. Motor Co.,* 193 N. C., 663. The purpose and effect of the trust receipt was to secure the payment of the note to plaintiff; this is done by the retention of title to the automobiles in the plaintiff, as vendor, until the Turner Motor Company, as vendee, shall have paid its note to plaintiff.

This Court has repeatedly said that in order to determine the nature of a contract, and the relation of the parties thereto, with respect to each other, and with respect to the subject-matter of the contract, it looks to the real intention of the parties and construes their contract accordingly, without much, if any, regard to the name by which it is designated or to the particular language employed. It follows from an application of this principle that the "courts, in determining whether or not a contract is one of bailment, or one of sale with an attempt to retain a lien for the price, in effect a mortgage, do not consider what description the parties have given to it, but what is its essential character." *Hamilton v. Highlands,* 144 N. C., 279. Where the interests of creditors or purchasers for value are involved in the construction of a contract affecting title to property, this just and equitable principle has been steadily adhered to by this Court. But for this, the statutes requiring the registration of chattel mortgages and conditional sales, for the protection of creditors and purchasers for value, would have been successfully disregarded, and the wise policy upon which these statutes are founded would have been in a large degree defeated.

C. S., 3312, which provides that "all conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing, and registered in the same manner, for the same fees, and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or in case the purchaser shall reside out of the State, then in the county where the personal estate, or some part thereof is situated, or in case of choses in action, where the donee, bargainee, or mortgagee resides," is applicable to the transaction between plaintiff and the Turner Motor Company with respect to the automobiles described in the complaint. This transaction resulted in a conditional sale by plaintiff to said company of said automobiles; although reduced to writing, it was not registered as required by statute in this State. It was therefore invalid, insofar as it undertook to retain title in the plaintiff to the automobiles, as against creditors of the Turner Motor Company. C. S., 3311. There was no error in the instruction of the court to the jury with respect to the first issue. Plaintiff's assignment of error based upon its exception to this instruction is not sustained.

In the brief filed in this Court in support of plaintiff's contentions upon the question presented for decision by its first assignment of error, many cases decided in other jurisdictions are cited. These cases may be found in the note in 49 A. L. R., 282, where they are discussed by the annotator. In some of them, the decision of the question presented supports the contention of plaintiff; in others, the decision is in accord with our decision in this case. We have followed the decisions of this Court, heretofore made, in cases involving our registration statutes; they are authoritative. This Court has construed these statutes liberally in furtherance of the oft-declared policy of this State. We are unable to discover sufficient grounds for the distinction, which plaintiff insists should be made, between a trust receipt, and a lease-contract, such as has often been under consideration by this Court. The principles upon which this Court has held these lease-contracts conditional sales of personal property are applicable to trust receipts, such as the one under which plaintiff claims title in this case. They have been frequently discussed and applied in opinions filed by this Court, and published in our reports.

The evidence pertinent to the third issue involving title to the two cashier's checks described in the complaint, tends to show the facts to be as follows:

After the execution of the trust receipt and note by the Turner Motor Company to plaintiff, and the delivery to said company of the four automobiles described in the trust receipt, and prior to the appointment of a receiver for said company, the Turner Motor Company sold two of said automobiles, and collected from the purchasers the purchase money therefor. Thereafter, the Turner Motor Company purchased from the First National Bank of Reidsville, N. C., two cashier's checks, one for $777, and the other for $680, both payable to the order of plaintiff, General Motors Acceptance Corporation. The Turner Motor Company paid for these cashier's checks with money which it had received for two automobiles sold by it. It does not appear clearly from the evidence whether these two automobiles are included in the trust receipt, bearing the identification No. 220228F, or whether they were included in another trust receipt, of the same form, executed by the Turner Motor Company to the plaintiff. All the evidence shows, however, that the money with which the Turner Motor Company paid for the two cashier's checks was received by it from the sale of two automobiles which had been delivered to it by plaintiff, in accordance with the terms of a trust receipt, identical in form with the trust receipt offered in evidence upon the trial of this case, and that the Turner Motor Company purchased said cashier's checks for the plaintiff with money derived from the sale of said automobiles. These cashier's checks were delivered by the bank to the Turner Motor Company, and remained in its possession until the appointment of the receiver for said company, about two weeks after the date of the first check, and a few days after the date of the second check, when they came into the possession of said receiver. The checks were never in the possession of plaintiff, nor has either of them been endorsed by plaintiff.

With respect to the third issue, the court instructed the jury that if they believed the evidence, and found therefrom the facts to be as all the evidence tended to show, they should answer the third issue "Yes." Defendants excepted to this instruction, and assigns same as error.

In support of this assignment of error, defendants contend that plaintiff is not the owner of the cashier's checks described in the complaint, and, therefore, is not entitled to the possession of the same as against defendants or either of them, for that all the evidence shows that said cashier's checks have never been delivered to plaintiff. It must be held, however, that as between plaintiff and defendant, Turner Motor Company, plaintiff is the owner of said cashier's checks. Plaintiff, by the terms of the trust receipt executed by Turner Motor Company, was the owner of the automobiles in its possession, and sold by the said Company, notwithstanding the fact that said trust receipt was not registered, for it is well settled that as between the parties to the contract, a conditional sale, although reduced to writing, is valid without registration, as prescribed by statute. *Dry-Kiln v. Ellington,* 172 N. C., 481; *Kornegay v. Kornegay,* 109 N. C., 188. Registration of a conditional sale, or of a chattel mortgage is required by statute for the protection of the vendor or mortgagee against the claims of creditors of or purchasers for value from the vendee or mortgagee. *Smith v. Fuller,* 152 N. C., 7. Although not registered, either is good as between the parties.

The evidence shows that the cashier's checks described in the complaint were purchased by the Turner Motor Company from the bank, and paid for with money derived from the sale of automobiles, the title to which, as between plaintiff and the Turner Motor Company was in plaintiff. The money received by the Turner Motor Company from the purchasers of the automobiles was at the time of the purchase of the cashier's checks specifically applied to the satisfaction of the claims of plaintiff to said automobiles. Upon well-settled principles of equity, plaintiff by reason of its ownership of the automobiles, as against the Turner Motor Company, must be held, as against said company, the owner of the cashier's checks purchased with the proceeds of the sale of said automobiles. *Bank v. Crowder,* 194 N. C., 312; *Bank v. Waggoner,* 185 N. C., 297; *Edwards v. Culberson,* 111 N. C., 342.

These cashier's checks, issued by the First National Bank of Reidsville, N. C., and payable to the order of plaintiff, were delivered by the bank to the Turner Motor Company. The said company did not by reason of such delivery become the owner of said checks; it received them from the bank, for delivery to plaintiff, in discharge of its indebtedness to plaintiff, arising out of the breach of its contract, as set out in the trust receipt, by the sale of the automobiles. The delivery of the cashier's checks to the Turner Motor Company, upon all the facts shown by the evidence, was a delivery by the bank to the plaintiff. The defendant, the First National Bank, is liable to plaintiff for the amount of its cashier's checks, unless there is evidence from which the jury could have found that defendant, D. F. Mayberry, receiver, has acquired title to said checks, in behalf of creditors of the Turner Motor Company.

These cashier's checks were not assets of the Turner Motor Company at the date of the appointment of defendant, D. F. Mayberry, as receiver of said company, nor at any time prior thereto. The Turner Motor Company had never owned said checks, or had title to the same; it held them only as bailee. No creditor of said company could have acquired a lien upon or title to said checks after their issuance and while they were in possession of said company. It therefore follows that the receiver acquired no title to or lien upon said checks, in behalf of creditors. The receiver of an insolvent corporation acquires only such title to property as the corporation had at the date of his appointment, or at the date of the commencement of the action in which the appointment is made. As, in the instant case, upon all the evidence, the Turner Motor Company had no title to the cashier's checks described in the complaint, its receiver acquired no title thereto.

It must therefore be held that there was no error in the instructions of the court to the jury upon the third issue. Defendants' assignment of error is not sustained. The judgment is affirmed.

No error.

JULIA L. BALLINGER v. C. E. THOMAS AND SOUTHERN RAILWAY CO.

(Filed 25 April, 1928.)

1. **Pleadings—Demurrer—Nature of Grounds—Cause of Action.**

A demurrer to the complaint will be sustained when, admitting for the purposes of the demurrer the truth of each material allegation of fact, and relevant inferences thereof reasonably deducible therefrom, a cause of action has not been sufficiently alleged.

2. **Same—Amendment.**

Where the plaintiff has not asked to be permitted to file an amendment to his complaint upon a demurrer being interposed thereto on the ground that a cause of action had not been sufficiently alleged, 3 C. S., 513, it will be considered on appeal that he has concluded to rely solely on the pleading he has filed.

3. **Torts—Joint Tort-Feasors—Liability—Negligence.**

One who has been injured while riding merely as a passenger in an automobile, and injured by the driver thereof acting wholly without her control or direction, and injured by the joint tort of the driver and another, she may sue them both for damages in the same action as joint *tort-feasors*, when the negligence of each concurs with the other in continuous and unbroken sequence in causing the injury complained of.

4. **Pleadings—Demurrer—Nature of Grounds—Cause of Action—Negligence—Proximate Cause—Railroads.**

Where a mere passenger in an automobile is injured at a railroad crossing, and brings action both against the driver of the automobile and the railroad company, and alleges in effect that the negligence of the driver of the automobile occurred after he had full knowledge of the negligence of the railroad company's employees, and that this negligence on the part of the driver independently caused the injury in suit: *Held,* a demurrer by the railroad is properly sustained, leaving the liability of the driver of the automobile to be determined.

5. Torts—Joint Tort-Feasors—Liability—Demurrer.

Where two defendants are sued to recover damages for an alleged joint tort, and one of them alleges sole responsibility for the alleged negligent act on the part of the other, an issue as to primary and secondary liability does not arise.

APPEAL by defendant, Southern Railway Company, from *Harding, J.,* at October Term, 1927, of GUILFORD.

Civil action brought by plaintiff against C. E. Thomas and Southern Railway Company to recover damages for an alleged negligent injury.

A demurrer was interposed by the Southern Railway Company upon two grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action against the demurring defendant; (2) that there is a misjoinder both of parties and causes of action.

The material allegations of the complaint, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. That on 9 June, 1927, plaintiff was a passenger in an automobile owned and driven by C. E. Thomas, when she was severely and permanently injured on State Highway No. 15, at a railroad crossing about two miles east of Charlotte, N. C.

2. That the defendant, C. E. Thomas, was negligent in the following particulars:

a. Said defendant carelessly, negligently and without regard for the safety of plaintiff, on approaching said railroad crossing, suddenly turned his automobile to the right and drove it off the concrete or asphalt highway and into a hole so that it turned over and injured plaintiff.

b. Said defendant negligently and in violation of law failed to bring his automobile to a complete stop fifty feet from the crossing.

c. Said defendant negligently failed to slow down or stop, look and listen for an oncoming locomotive, but drove his automobile within a few feet of the crossing before undertaking to avoid the oncoming locomotive.

d. Said defendant negligently approached the crossing at a rapid and unlawful rate of speed and in a careless and negligent manner when he knew, or by the exercise of ordinary care should have known, that it was a place of danger and that a locomotive might be approaching.

e. Said defendant "then upon observing the oncoming locomotive, carelessly and negligently turned the said automobile off the highway and turned the same over as hereinbefore alleged."

3. That the defendant, Southern Railway Company, was negligent in the following particulars:

a. Said defendant negligently and carelessly failed to give any timely warning of the approach of its locomotive either by ringing a bell or blowing the whistle.

b. Said defendant's engineer or fireman failed to keep a proper lookout "so as to slow down or stop the said locomotive in time to avoid placing the defendant, C. E. Thomas, in a position of peril, and the joint and concurrent negligence of the defendants proximately caused the injury of this plaintiff."

c. Said defendant's employees knew, or by the exercise of ordinary care could have known, that the crossing in question was a dangerous one and that the view of persons on the highway was obstructed by the underbrush and the curvature of the track.

d. Said defendant carelessly and negligently failed to keep a proper lookout when by so doing, its servants might have been able to observe plaintiff's position of peril in time to have slowed down the locomotive and thus enabled the defendant Thomas to pass over the crossing without injuring the plaintiff.

4. That all of said "acts of negligence on the part of the defendants jointly and concurrently proximately caused the plaintiff's injury, which injury was through no fault of said plaintiff, for that she was not familiar with the highway and did not know of the existence of said crossing or that any danger was imminent."

The defendant, C. E. Thomas, filed answer in which he denied any negligence on his part and alleged that by reason of the negligence of the Southern Railway Company, in failing to give timely warning of the approach of its rapidly moving train, he was suddenly placed in a position of peril, and in order to prevent a collision and save himself, as well as the plaintiff, he was forced to turn his automobile from the highway, which he did without negligence on his part, etc. Said defendant further averred and set up that if he were liable to the plaintiff in any respect, such liability was secondary and that of his codefendant primary, wherefore he asked that an issue of primary and secondary liability, as between the defendants, be submitted to the jury, and that he have judgment over for any amount plaintiff might recover against him.

The defendant, Southern Railway Company, also demurred to the answer of its codefendant, C. E. Thomas.

From a judgment overruling the demurrer to the complaint on both grounds, and dismissing the demurrer to the answer of the defendant, C. E. Thomas, the Southern Railway Company appeals, assigning errors.

Frazier & Frazier for plaintiff.
King, Sapp & King for defendant, C. E. Thomas.
Hobgood, Alderman & Vinson for defendant, Southern Railway Co.

STACY, C. J., after stating the case: The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law. *S. v. Bank,* 194 N. C., 436; *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800.

It is provided by 3 C. S., 513, that when a demurrer is filed to a complaint, the plaintiff may be allowed to amend, so as to obviate the necessity of debating the rights of the parties on mere allegations rather than on evidence and findings of fact. But as this was not done in the instant case, and as both parties are standing strictly upon their rights, we must assume that the plaintiff has laid her case precisely as she hopes to recover, or as her evidence will tend to show, and upon the allegations of the complaint, thus deliberately made and unchanged or unamended when challenged, we are required to say, in the first instance, whether sufficient facts have been stated to constitute a cause of action against the Southern Railway Company. If this be decided in the negative, the second ground upon which the appealing defendant bases its demurrer to the complaint need not be considered.

That one who is riding in an automobile, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence, is fully established by our own decisions and the great weight of authority elsewhere. *Hanes v. Utilities Co.,* 191 N. C., 13, 131 S. E., 402; *White v. Realty Co.,* 182 N. C., 536, 109 S. E., 564; *Wood v. Public Service Corp.,* 174 N. C., 697, 94 S. E., 459; *Pusey v. R. R.,* 181 N. C., 137, 106 S. E., 452; *Bagwell v. R. R.,* 167 N. C., 611, 83 S. E., 814; *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299; *Carterville v. Cook,* 129 Ill., 152, 16 Am. St. Rep., 248, and note.

The rule is stated in *Matthews v. Delaware L. & W. R. Co.,* 56 N. J. L., 34, 27 Atl., 919, 22 L. R. A., 261, by *Magie, J.,* as follows: "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well settled principles, each, any or all of the *tort-feasors* may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the *tort-feasors* are subject to joint and several liability."

But do the allegations set out in the complaint bring the instant case within the principle announced in these decisions? The plaintiff says that they do, while the demurring defendant says that they do not. We think the facts alleged are insufficient to state a cause of action against the Southern Railway Company, and that the case is controlled by the decision in *Harton v. Tel. Co.,* 146 N. C., 430, 59 S. E., 1022. As the case is one which deals with exactness of phrase, perhaps it would be a little more accurate, though somewhat redundant, to say that the complaint apparently first undertakes to state a cause of action against both defendants, and then withdraws it as against the appealing defendant. We must consider the pleading in its entirety.

The demurrer might be overruled and the judgment upheld but for the allegation against the defendant Thomas, the driver of the automobile in which the plaintiff was riding (set out in paragraph "e" above), to the effect that said defendant, *upon observing the oncoming locomotive,* carelessly and negligently turned his automobile off the highway and ran it into a hole so that it turned over and injured the plaintiff. This alleged negligent conduct of the defendant Thomas, it will be observed, took place after he had seen the oncoming locomotive, which necessarily "insulated" the negligence of the appealing defendant, as it was no longer operative or active, and rendered Thomas' negligence the proximate cause of plaintiff's injury. *Harton v. Tel. Co.,* 146 N. C., 430, 59 S. E., 1022. Note, it is not alleged in the complaint that Thomas, the driver of the automobile, ran his machine off the highway to avoid a collision or in an effort to extricate himself and the plaintiff from a position of peril, produced by the negligence of the railroad company, but the allegation is that said defendant carelessly and negligently, *i. e.,* needlessly, drove his car off the highway, after he had all the information which bell or whistle signal would have given him, and injured the plaintiff. This necessarily means that the alleged negligence of the railroad company was remote, while that of the defendant Thomas was proximate. *Construction Co., v. R. R.,* 184 N. C., 179, 113 S. E., 672. Hence, upon all the facts alleged by the plaintiff in her complaint, it appears that the negligence charged against the defendant, Southern Railway Company, was not in law the proximate cause of her injury.

Speaking to the subject in his valuable work on Negligence (138), Mr. Wharton very pertinently says: "Suppose that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff: is the defendant liable to plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of defendant's responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable."

The same rule announced by *Mr. Justice Strong* in *R. R. v. Kellogg,* 94 U. S., 469, regarded as sound in principle and workable in practice, has been quoted with approval in a number of our decisions. He says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

The allegation that the negligence of "the defendants jointly and concurrently proximately caused the plaintiff's injury" is but a conclusion of the pleader, negatived by the facts previously alleged, and is not admitted by the demurrer. *Broad Street Bank v. Nat. Bank,* 183 N. C., 463, 112 S. E., 11.

From a careful perusal of the record, viewed in the light of the pertinent authorities on the subject, we are of opinion that the complaint does not state facts sufficient to constitute a cause of action against the appealing defendant, Southern Railway Company. For this reason, the demurrer to the complaint should have been sustained.

While the allegations presently appearing of record may not be sufficient to raise an issue of primary and secondary liability as between the defendants, nevertheless the answer of the defendant, C. E. Thomas, is not subject to demurrer. *Taylor v. Construction Co., ante,* 30; *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502. He alleges that the Southern Railway Company is solely responsible for plaintiff's injury. This latter pleading on the part of the appealing defendant was properly dismissed.

Nothing was said in *Moses v. Morganton,* 192 N. C., 102, 133 S. E., 421, which militates against our present position.

Reversed in part and affirmed in part.

STATE v. RAYMOND DOWELL.

(Filed 2 May, 1928.)

1. **Intoxicating Liquor — Criminal Prosecution — Unlawful Possession—Burden of Proving Exception or Provisos to Statute—Statutes.**

Under 3 C. S., 3411(j), making the possession of intoxicating liquor prima facie evidence of unlawful purpose, the State is not required to allege or prove that the case does not fall within the exception allowing possession in a man's dwelling for his personal use, the use of his family, or the entertainment of his bona fide guests therein, this being a matter of defense, must be alleged and proven by the defendant.

2. **Same—Prima Facie Case—Nonsuit.**

Where intoxicating liquor is found in the possession of the defendant, and he does not take the witness stand or offer evidence to prove himself within the exception relating to possession in his dwelling for his personal use allowed by the only exception to the statute, and the State has made out a prima facie case of possession, a motion as for nonsuit is properly overruled. C. S., 4643.

3. **Same—Burden of Proof.**

Where the State has introduced evidence tending to show the unlawful possession of intoxicating liquor by the defendant, making out a prima facie case of its being for an unlawful purpose, the burden of proof is on the State to show guilt of defendant beyond a reasonable doubt, and the defendant is required to show that his possession was within the statutory exception.

BROGDEN, J., dissenting.

APPEAL by defendant from *Stack, J.,* at September Term, 1927, of FORSYTH. No error.

The bill of indictment contained 5 counts and charged that defendant (1) unlawfully did sell, barter, furnish, and deliver intoxicating liquor; (2) unlawfully did transport, import and export intoxicating liquor; (3) unlawfully did purchase intoxicating liquor; (4) unlawfully did possess intoxicating liquor; (5) unlawfully did have in possession intoxicating liquor for the purpose of being sold, bartered, exchanged, given away, furnished and otherwise disposed of in violation of the provisions of the act of the General Assembly of North Carolina, enacted at its session 1923, and ratified 1 March, A.D. 1923, being entitled "An act to make the State Law conform to the National Law in relation to intoxicating liquors."

The testimony was to the effect that Guy Scott, a deputy sheriff, in consequence of information received in regard to defendant, procured a search warrant and went with E. J. Conrad and L. Newsom to defendant's home, about 5 miles south of Winston-Salem, on the Lexington road. It was in the middle of the afternoon. "When I was getting out of the car I heard some glass rattling in the house. I ran in the house, and when I went in the kitchen door I met Raymond Dowell's wife coming out of the door. I went in through the kitchen, and into the room, and in that room there was an old like hearth, and liquor was about half an inch deep in this hearth, and a gallon jug and a half-gallon fruit jar had been broken, lying there, and I looked out and saw Dowell going through the field and Mr. Conrad after him. The hearth where the liquor was on it was in the bed room. There were three rooms in this house. This was the defendant's dwelling-house. He and his family lived there, or he said he did."

L. Newsom corroborated Guy Scott, in regard to the liquor and testified further: "As we went in the kitchen door Raymond Dowell jumped out of the bed-room window, which was the middle room, and which was the room the whiskey was in. Defendant ran right down through the field, and Mr. Conrad ran after him and caught him. Mr. Conrad is an officer. . . . The floor was wet all along the floor around the hearth and on the hearth, and a plank torn up in the floor, and there were three empty jugs under the floor. That was the same room in which we found the liquor on the hearth. Defendant jumped out of the window of that room and ran. There was one bed in that room." The defendant introduced no evidence.

The verdict of the jury was we "find the defendant guilty of unlawful possession of intoxicating liquors and possession of intoxicating liquors for the purpose of sale."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

John D. Slawter for defendant.

CLARKSON, J. The defendant moved to dismiss each and every count in the bill of indictment. The court below allowed the motion as to the first, second and third counts, but declined to grant the motion for judgment as of nonsuit or dismiss the action as to the fourth and fifth counts in the bill of indictment. C. S., 4643. We think the court below correct.

Chapter 1, sec. 1, Laws 1923 (known as the Turlington or Conformity Act) in part, is as follows: "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes," etc. 3 C. S., 3411(a).

Section 2: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this act; and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of 'The Volstead Act,' act of Congress enacted October twenty-eight, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act, 'R. 7294,' an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one." 3 C. S., 3411(b).

Section 10, is as follows: "From and after the ratification of this act the possession of liquor by any person not legally permitted under this act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this act. But it shall not be unlawful to possess liquor in one's private dwelling only, while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein." 3 C. S., 3411(j).

The court below, after defining what was actual and constructive possession (*S. v. Meyers,* 190 N. C., 239), charged the jury, in part, as follows: "The court instructs you that the burden of proof is upon the State to satisfy you beyond a reasonable doubt that he had the liquor in his possession, either actual or constructive, and the court further instructs you that if he did have it in his possession that it would be unlawful, unless he had it in his home for his own use, for his own personal use or the use of his bona fide friends or guests. The possession of liquor anywhere in the home or out of the home is prima facie evidence that he is keeping it for the purpose of violating the law. It is prima facie evidence that he is keeping it in violation of the law, and what is meant by that is, that it is artificial evidence created by the law from certain facts and sufficient to carry the case to the jury, and upon which the jury may act either way. The defendant has not gone upon the stand and testified, but you cannot use that to his prejudice. The court instructs you that if he had this liquor in his home for the purpose of selling it, or for the purpose of giving it away, except as mentioned in the statute, or for the purpose of furnishing it to somebody else, except as mentioned in the statute, he would be guilty, but if he had it in his home for his own bona fide use, his personal use or the use of his bona fide guests, then he would not be guilty (and the court instructs you as to whether or not he had it for that purpose is a matter that is within his own knowledge alone and therefore, the burden is upon him to show that he had it for his own consumption or for the use of his bona fide guests)." The only part of the charge to which exception and assignment of error was made, was the latter part of the charge above set forth in brackets.

The charge of the court was confined to the 4th and 5th counts which we are now considering, the counts under which defendant was convicted: (1) unlawfully did possess intoxicating liquors; (2) unlawfully did have in possession intoxicating liquor for the purpose of being sold.

(1) Under the above statutes, it is unlawful for any person to possess liquor (except as authorized in the act not material here to be considered) and *"except in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein."* The possession of liquor in the private dwelling for any other purpose than as above stated in the exception is unlawful. (2) "The possession of liquor by any person not legally permitted under this act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this act." This prima facie evidence for sale, etc., applies to the private dwelling or elsewhere. *S. v. Mull,* 193 N. C., p. 668.

We have heretofore construed the act applicable to facts as they were presented in this Court in the particular case. In *S. v. McAllister,* 187 N. C., p. 403, it was held unlawful to possess liquor when not "in one's private dwelling while the same is occupied and used by him as his dwelling only . . . for use only for the personal consumption of the owner thereof and the family residing in such dwelling and of his bona fide guests when entertained by him therein." *S. v. Meyers,* 190 N. C., 239; *S. v. Sigmon, ibid.,* 684; *S. v. Baldwin,* 193 N. C., 566. In *S. v. Hammond,* 188 N. C., p. 602, it was held that the statute did not prohibit the receiving of liquor.

In *S. v. Knight,* 188 N. C., 630, evidence tending to show that the defendant had intoxicating liquor in his possession before the passage of the act, is not a defense under its provisions for the defendant's possession a year thereafter upon an indictment under the act of possessing liquor. The liquor in controversy was not in his private dwelling.

In *S. v. Mull,* 193 N. C., 668, the liquor was in the private dwelling, there was a verdict of "guilty of receiving and possessing." Under *Hammond's case, supra,* the verdict for receiving could not be sustained, nor could the verdict for possessing, as the possession was not alleged or shown to be unlawful; and further, the liquor was not in the actual or constructive possession of defendant.

In *S. v. Winston,* 194 N. C., p. 243, it is held: While section 10 of the Turlington Act (chapter 1, Public Laws 1923, 3 C. S., 3411(j), *supra*) does not make it a criminal offense for one to have intoxicating liquor in one's private dwelling, occupied and used by him as his dwelling only, for his own personal use or that of his family residing in such dwelling and his bona fide guests when entertained by him therein, it is a violation of the criminal law, by the express provisions of (chapter 1, Public Laws 1923, sec. 2), 3 C. S., 3411(b), for him to either purchase it elsewhere or carry it there.

In *S. v. Pierce,* 192 N. C., at p. 770, the following charge was sustained: "'Prima facie evidence means that evidence which is received and accepted and continued until the contrary is shown, and you gentlemen of the jury, will remember the evidence, giving the State of North Carolina a fair and an impartial trial, and giving the defendant at bar a fair and impartial trial.' This instruction, standing alone, may be subject to some criticism (*S. v. Wilkerson,* 164 N. C., p. 431), but in this immediate connection the judge charged the jury as follows: 'Now the State has the duty of satisfying you beyond a reasonable doubt of the guilt of the defendant,' etc., and defined reasonable doubt."

In *S. v. Smith,* 157 N. C., at p. 583, quoting from Joyce on Indictments, sec. 279, the following principle is laid down: "The general rule as to exceptions, provisos, and the like, is that where the exception or proviso forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso. But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation; for it is a matter of defense. But where there is an exception so incorporated with the enacting clause that the one cannot be read without the other, then it is held that the exception must be negatived." *S. v. Connor,* 142 N. C., 700; *S. v. Moore,* 166 N. C., 284; *S. v. Hege,* 194 N. C., 526.

The court below charged correctly as to prima facie evidence. The burden of proof was placed on the State all through the charge and the court below stated several times that the evidence must be sufficient to satisfy the jury beyond a reasonable doubt as to the guilt of defendant. It was not necessary to negative the exception, for it was a matter of defense.

In Archbold's Criminal Pleading, the principle is thus stated (quoting from *S. v. Connor, supra,* at p. 704): "These negative averments seem formerly to have been proved in all cases by the prosecutor; *but the correct rule upon the subject seems to be in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge,* the negative is not to be proved by the prosecutor, but, on the contrary, *the affirmative must be proved by the defendant, as matter of defense;* (Italics ours) but, on the other hand, if the subject of the averment does not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative." The principle is well settled in this State. See *Speas v. Bank,* 188 N. C., at p. 529 and cases cited; *Walker v. Parker,* 169 N. C., 150; *Shaw v. Public-Service Corp.,* 168 N. C., 611.

In construing the *Harrison Anti-Narcotic Act,* dealing with the presumption created by statute, in *Gee Woe v. United States,* 250 Fed. Rep., at p. 429, it is said: "That presumption of this and like kind, rebuttable and explainable by the accused persons, are within the competency of Congress to create, it is well settled. *Luria v. United States,* 231 U. S., 9-25, 34 Sup. Ct., 10, 58 L. Ed., 101; *United States v. Yee Fing* (D. C.), 222 Fed., 154."

In *Casey v. United States, Mr. Justice Holmes* delivering the opinion of the Court (9 April, 1928) construing said act, says: "With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed,' *Luria v. United States,* 231 U. S., 9, 25; *Yee Hem v. United States,* 268 U. S., 178, 183. Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer v. United States,* 245 U. S., 559. The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, sec. 2494. It is consistent with all the constitutional protections of accused men to throw on them, the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, sec. 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law. The petitioner cannot complain of the statute except as it affects him."

In *Donnelley v. United States, Mr. Justice Butler,* delivering the opinion of the Court (9 April, 1928), says: "The act is comprehensive and discloses a legislative purpose fully to enforce the prohibition declared by the Eighteenth Amendment. National Prohibition Cases, 253 U. S., 350. *Corneli v. Moore,* 257 U. S., 491; *Vigliotti v. Pennsylvania,* 258 U. S., 403; *Grogan v. Walker & Sons,* 259 U. S., 80; *Everard's Breweries v. Day,* 265 U. S., 545, 560; *Lambert v. Yellowley,* 272 U. S., 581, 595."

The charge in other respects was fair and impartial, giving defendant every legal right. We find in law

No error.

BROGDEN, J., dissenting: The Turlington Act by express terms declares that it shall not be unlawful for a person to possess liquor in his own dwelling provided it is to be used only for the personal consumption of the owner and his family therein residing and his bona fide guests when entertained therein by such owner.

In construing the statute it has been held that possession of liquor even within the home of the owner is prima facie evidence that he is keeping it for the purpose of violating the law. In other words a lawful act is prima facie evidence of an unlawful purpose. Albeit, this is water that has long since gone over the wheel.

The judge charged in accordance with the decisions applicable, that the possession of liquor in the home of the defendant was prima facie evidence that he had it there in violation of the law. This carried the case to the jury. Under the law, the defendant had two alternatives. He could offer evidence in his defense, or he could decline to offer evidence and rely upon the weakness of the State's case supported in either event by the presumption of innocence which the law raised in his favor. The defendant pleaded not guilty. His plea denied the possession of the whiskey and every other element of the crime. He offered no evidence.

The trial judge, however, went further and instructed the jury: "The burden is upon him to show that he had it for his own consumption or for the use of his bona fide guests."

This charge, as I see it, is erroneous for the following reasons:

1. It deprived the defendant of the right to rely upon the weakness of the State's case, because it imposed upon him the burden of showing that the possession was not unlawful or to state the proposition differently, the burden was upon him to rebut the prima facie case made out by the State.

2. It deprived the defendant of the benefit of the presumption of innocence, because the presumption of innocence and the burden of rebutting the prima facie evidence of the State cannot exist at the same time and run concurrently throughout the trial.

The opinion of the Court, however, proceeds upon the theory that the proviso of section 10 of the Turlington Act is a matter of defense and therefore the burden is upon the defendant to show that he comes within the proviso, that is to say, he possessed the liquor in his home for his personal use or for the entertainment of his bona fide guests. The authorities cited in support of this position are *S. v. Connor,* 142 N. C., 700; *S. v. Moore,* 166 N. C., 284; *S. v. Hege,* 194 N. C., 526. In the *Hege case* the liquor was found in the basement of defendant's store and not in his dwelling at all. Obviously the proviso referred to did not apply. In the *Moore case* the main question involved was sufficiency of allegations in the warrant, and related to what the State ought to allege and prove. In the *Connor case* the judge charged the jury "that the burden was on the defendant to prove that the woman in the case was neither innocent nor virtuous," but the Court held that this instruction was error and awarded a new trial for such specific error. The opinion declares: "In such circumstances, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same." As I interpret it, it does not support the opinion of the Court in the case at bar, but is rather to the contrary. Moreover the defendant in this case did not go upon the witness stand or offer evidence to the effect that the whiskey was possessed by him for his own consumption or for his bona fide guests. If he had sought the protection of the proviso, then the charge complained of would perhaps have been correct.

In *S. v. Wilkerson,* 164 N. C., 434, it is declared: "How can we say that prima facie evidence, or that which is apparently sufficient, excludes all reasonable doubt of guilt, and by its own force overcomes the presumption of innocence? The bare statement of the proposition is sufficient to show its fallacy. It would destroy the presumption of innocence and take away the protection of the other rule as to reasonable doubt. The presumption of innocence attends the accused throughout the trial and has relation to every essential fact that must be established in order to prove his guilt beyond a reasonable doubt. He is not required to show his innocence; the State must prove his guilt." It will be noted that in the *Wilkerson case* the court charged that if the jury had a reasonable doubt they should acquit the defendant. Liquor cases do not involve the "shifting of the burden" as pointed out in *S. v. Reddit,* 189 N. C., 176, and that line of cases.

In *S. v. Hammond,* 188 N. C., 602, the defendant offered no evidence as in the case at bar, and requested the court to charge the jury as follows: "If the jury find from the evidence that the house in which the intoxicating liquors in question were found was at the time used and occupied as the dwelling only of defendant and such liquors were for her personal consumption only and her bona fide guests, when entertained by her therein, the jury will return a verdict of not guilty." The court refused to give this instruction. *Chief Justice Hoke,* writing the opinion, said, "We think the prayer embodies a correct proposition, so far as the charge of unlawful possession is concerned, and should have been given if restricted to that count, but the failure or refusal to give the instruction may not be held for reversible error because such refusal does not necessarily or probably affect the verdict on the other counts in the bill. As heretofore stated, there is a general verdict of guilty, amounting to a conviction on each and every count in the bill, and the prayer could not have been properly given because of the requested direction therein of a general verdict of not guilty."

In the case at bar there was a nonsuit as to all counts except the fourth and fifth, and both of these counts charge unlawful possession. Applying the rule announced in the *Hammond case* to the case at bar, the defendant would have been entitled to the charge referred to in the *Hammond case,* which charge or instruction has no reference whatever to any "burden" to show that he had the whiskey for his own consumption, etc.

Upon the facts disclosed by the present record, it appears to me that the *Hammond case* is decisive of the point.

In *Casey v. United States,* referred to in the opinion of the Court, the question involved was one of purchase and not of possession. Moreover, the decision was rendered by a sharply divided Court. *Mr. Justice Butler* dissenting, declared: "And above all, the statutory rule of evidence should be construed having regard to the ancient and salutary doctrine known and rightly cherished as fair play by the people, the bar and the courts of this country, that every person on trial for crime is presumed to be innocent; and, that in order to convict him, the evidence must satisfy the jury beyond a reasonable doubt that he is guilty of the crime charged. . . . The connection, if any, between the possession shown and the substance of the offense charged is too remote. Attention has not been called to any decision that goes so far. None can be found."

T. K. CAUSEY ET AL. v. A. L. MORRIS ET AL.

(Filed 2 May, 1928.)

1. **Clerks of Court—Right to Change Venue.**

   The clerk of the Superior Court has the right to order an action transferred to another county only when a defendant is entitled thereto as a matter of right, and not when it is a matter of discretion; in the latter case it is to be exercised by the judge of the Superior Court upon motion properly made in term.

2. **Courts — Superior Courts — Right to Change Venue — Discretionary Power—Review.**

   The exercise of the court's discretionary power to transfer a cause to another county for the convenience of witnesses and to promote the ends of justice, C. S., 470(2), is not reviewable in the Supreme Court. But where, on appeal from the clerk's order removing the action on this ground and on the ground of movant's legal right, the court sustains the order on the latter ground alone, the clerk's right to issue the discretionary order is not presented on appeal to the Supreme Court, but the correctness of the order based on movant's legal right is left to be determined.

3. **Venue—Nature or Subject of Action—Interest in Real Property—What Constitutes Real Action—False Pretense.**

   When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under C. S., 463(1), and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue. C. S., 469.

4. **Courts—Superior Courts—Trial De Novo—Venue.**

   On appeal from the order of the clerk of the Superior Court ordering a cause transferred to another county as a matter of right, on the ground that the action involves an interest in lands, C. S., 463(1), the matter should be heard *de novo* during the term of court. 3 C. S., 913(a).

APPEAL by plaintiffs from order of *Stack, J.*, at January Term, 1928, of GUILFORD. Reversed.

Motion for the removal of the above entitled action from the Superior Court of Guilford County to the Superior Court of Rutherford County, for trial, upon the ground that the action is for the determination of a right to or an interest in land situate in Rutherford County, and also upon the ground that the convenience of witnesses and the ends of justice will be promoted by such removal.

From an order allowing the motion, upon the first ground only, and thereupon removing the action in accordance therewith, as a matter of right, plaintiffs appealed to the Supreme Court.

Frazier & Frazier and Edward C. Jerome for plaintiffs.
Edwards & Duncan and Quinn, Hamrick & Harris for defendants.

CONNOR, J. Plaintiffs and defendants are all residents of this State. Plaintiffs reside in Guilford County; defendants reside in Rutherford County. This action was commenced in the Superior Court of Guilford County, by summons issued on 20 October, 1927. The summons was duly served on defendants on 27 October, 1927.

After the complaint was filed and before the time for answering had expired, defendants demanded in writing, by motion before the clerk, that the action be removed from the Superior Court of Guilford County to the Superior Court of Rutherford County, for trial, for that Guilford County is not the proper county for the trial of the action. C. S., 470. The ground for this motion was that the action is for the determination of a right to or an interest in land situate in Rutherford County. C. S., 463, subsec. 1. Defendants also prayed that the action be removed by the clerk, in his discretion, for that the convenience of witnesses and the ends of justice would be promoted by the removal from Guilford County to Rutherford County. C. S., 470, subsec. 2. From the order of the clerk, allowing the motion, both as a matter of right, and in his discretion, plaintiffs appealed to the judge, presiding at the next term of the Superior Court of Guilford County. 3 C. S., 913(a). The motion was heard and passed upon, *de novo,* as prescribed by statute, by the judge who allowed the motion as a matter of right, upon the ground, that the action is for the determination of a right to or an interest in land situate in Rutherford County, and is in effect for the foreclosure of a mortgage upon said land, or for the redemption of said land from a mortgage. The judge did not pass upon, or allow the motion for removal, in his discretion, upon the ground that the convenience of witnesses and the ends of justice would be promoted by the removal as prayed for by defendants. Defendants' motion was allowed, and the action removed, by the judge, only as a matter of right. Plaintiffs excepted to the order of the judge, and appealed therefrom to this Court.

The question as to whether a motion for the removal of an action from the Superior Court of the county in which it was commenced, and in which it is pending, to the Superior Court of another county, for trial, upon the ground that the convenience of witnesses and the ends of justice will be promoted thereby, may be made before the clerk, in the first instance, and then heard by the judge *de novo* upon an appeal from the order of the clerk, allowing or disallowing the motion, is not presented on this record. A motion for removal on this ground, as authorized by statute, C. S., 470, subsec. 2, is addressed to the discretion of the court; its order, allowing or disallowing the motion, is not reviewable on appeal to this Court. *Craven v. Munger,* 170 N. C., 424; *Oettinger v. Livestock Co.,* 170 N. C., 152. The statute authorizing motions for removal to be made before the clerk, refers only to motions to remove as a matter of right. 3 C. S., 913(a). Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. *Howard v. Hinson,* 191 N. C., 366. The clerk of the Superior Court of Guilford County was without power, under the statute, to remove this action, upon the ground that the convenience of witnesses and the ends of justice would be promoted by the removal. The motion for removal upon this ground can be made only before the judge, during a term of the Superior Court.

If the venue for the trial of this action is to be determined solely by the residence of the parties, defendants are not entitled to an order of removal, as a matter of right, for where both plaintiffs and defendants are residents of this State, the plaintiffs are entitled to choose the county of their residence as the forum for the trial of the action. C. S., 469. *Craven v. Munger,* 170 N. C., 424. However, if the action, commenced in Guilford County, and pending therein, is for the determination of a right to or an interest in land situate in Rutherford County, or for the foreclosure of a mortgage on said land, defendants, having moved therefor, in writing, before the clerk, and before the time for answering the complaint had expired, are entitled to the order of removal, as a matter of right, for by statute, when an action is for the determination of a right to or interest in land, or is for the foreclosure of a mortgage on land, it must be tried in the county in which the land is situate, subject to the power of the court to change the place of trial, in its discretion, as authorized by statute, provided defendant has not waived his right to a removal by failure to demand the same, in writing and in apt time. The question involved in this appeal, therefore, is whether the action, as set out in the complaint, is for the determination of a right to or an interest in land situate in Rutherford County, or for the foreclosure of a mortgage on said land. If this question is answered in the affirmative, there was no error in the order of removal, and the order must be affirmed; if in the negative, there was error, and the order must be reversed.

It appears from the allegations of the complaint that in February, 1926, plaintiffs purchased from defendants a certain tract of land, containing 208 acres, situate in Rutherford County, and located in close proximity to the properties of The Chimney Rock, Incorporated, and Lake Lure; that the purchase price for said tract of land, as agreed upon by the parties, was $200 per acre, or $41,600.00; that plaintiffs have paid to defendants, on account of said purchase price, the sum of $20,300.13, and that defendants now hold notes executed by plaintiffs for the balance due thereon.

Plaintiffs allege that as inducements to them to purchase said tract of land, at the price agreed upon, defendants made certain representations with respect to improvements which the owners of adjoining lands had decided to make upon their said lands, in the near future, which improvements when made would greatly enhance the value of the tract of land which defendants proposed to sell to plaintiffs; that plaintiffs relied upon said representations, and because of same bought the said tract of land, at the price agreed upon; that said representations were false and fraudulent, and the said improvements have not been made upon the adjoining lands; that the tract of land purchased of defendants by plaintiffs, without the improvements on the lands near by, which defendants falsely and fraudulently represented that the owners had decided to make, was not worth the sum of $41,600.00, but was worth only the sum of $5,200.00.

Plaintiffs allege that they have suffered damages by reason of the false and fraudulent representations made by defendants, in the sum of $15,100.13, this being the difference between the amount paid by plaintiffs on the purchase price of said land, and its value; they demand judgment that they recover of defendants the sum of $15,100.13, and that the notes executed by plaintiffs and now held by defendants be canceled and delivered to plaintiffs.

This is an action to recover damages for false and fraudulent representations by which plaintiffs were induced to purchase a tract of land from defendants, and to have certain notes executed by plaintiffs and held by defendants canceled, in partial satisfaction of such damages. If plaintiffs had paid or should be required to pay said notes, the amount of their damages would be increased. The representations alleged in the complaint were not made with respect to the title to or the boundaries of the tract of land which plaintiffs purchased of defendants, but were made with respect to facts which if true would have materially enhanced the market value of the tract of land. It is not an action for the specific performance of a contract for the purchase of land, as was the case in *Council v. Bailey,* 154 N. C., 54; nor is it an action for the rescission or cancellation of such contract, as was the case in *Vaughan v. Fallin,* 183 N. C., 318.

It was held in *Eames v. Armstrong,* 136 N. C., 393, that an action to recover damages for the breach of a covenant in a deed was not an action for the determination of a right to or an interest in land, and that, therefore, the action was not removable as a matter of right to the county in which the land described in the deed was situated. In *Griffin v.*

Barrett, 176 N. C., 473, it was held that the test as to whether the title to land is involved in an action, for the purpose of determining its removability as a matter of right, is the judgment which the plaintiff may recover upon the allegations of the complaint. If the plaintiff is entitled to a judgment which will affect the title to land, the action must be tried in the county in which the land is situate; otherwise, it is not removable to such county as a matter of right.

Applying this test to the instant case, it must be held that there was error in the order removing the action from Guilford County to Rutherford County. The title to the land situate in Rutherford County, purchased by plaintiffs of defendants, cannot be affected by any judgment which plaintiffs may recover of defendants upon the allegations of the complaint. Such judgment cannot be a lien on said land, nor can said land be sold for the satisfaction of said judgment, for defendants having conveyed the land to the plaintiffs are not the owners thereof. Notwithstanding said judgment, plaintiffs will remain the owners of said land, claiming title thereto under their deed from defendants.

It does not appear from the allegations of the complaint that the notes of plaintiff, held by defendants, which plaintiffs pray to have canceled, are secured by mortgage or deed of trust upon the land. They are not liens upon the land, because they are purchase-money notes. The answer appearing in the record, which defendants have caused to be prepared, and which they propose to file, cannot be considered upon the motion for removal, for, as required by statute, this motion was made before the time for answering had expired. If defendants had filed an answer, before they made the motion for removal, as a matter of right, they would have thereby waived their right to a removal. *Brown v. Harding,* 170 N. C., 253. This is not an action to foreclose a mortgage, nor for the redemption of land from a mortgage. We therefore do not pass upon the question discussed in the brief of plaintiff's counsel, as to whether an action for the redemption of land from a mortgage must be tried in the county in which the land is situate in the absence of express statutory requirement to that effect. The statute does not so require; it is well settled that venue is a matter for statutory regulation. *Clark v. Homes,* 189 N. C., 703.

Having concluded that this is not an action for the determination of a right to or an interest in land, or for the foreclosure of a mortgage, we must hold that the order removing the action to Rutherford County was erroneous. The order is, therefore,

Reversed.

STATE v. THOMAS MASLIN.

(Filed 2 May, 1928.)

1. **Embezzlement—Indictment Therefor—Sufficiency Thereof—Demurrer.**

When the evidence upon the trial tends to support charges in the indictment that the defendant was an officer, agent, and director of a bank, and had unlawfully, wilfully and feloniously embezzled a certain amount of its funds held in trust, with the intent to defraud, following the material words of the statute in force at the time of the committing of the offense charged, it is sufficient to sustain a general verdict of guilty upon the charges contained in the indictment, variously stated as did "embezzle," did "abstract," etc., and a demurrer thereto is bad. 3 C. S., 224(e), 4401.

2. **Indictment—Requisites and Sufficiency Thereof.**

An indictment for a criminal offense is ordinarily sufficient if it uses the descriptive words given in the statute applicable as constituting the offense, or substantially so many of them as will enable the court to determine the one on which it is founded.

3. **Embezzlement—Indictment—Sufficiency Thereof.**

Under an indictment of an officer of a bank for embezzling a part of its trust funds, the charge embezzlement carries the meaning of the wrongful conversion of the funds by the defendant to his own use, and the failure to specifically charge that the bank had entrusted the defendant with the funds, or that there had been a breach of a trust relationship by the defendant with the bank is not a requisite to its validity.

4. **Embezzlement—Evidence—Expert Testimony—Parol Evidence.**

Expert evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment.

5. **Criminal Law—Evidence—Character Evidence.**

The defendant in a criminal action puts the credibility of his testimony in evidence, subject to impeachment, when he becomes a witness in his own behalf, and when relating only to his credibility as a witness, it is competent for the State to ask him, on cross-examination, whether he was not then under indictment for similar or like offenses.

APPEAL by defendant from *Stack, J.*, at September Term, 1927, of FORSYTH.

The indictment contains three counts, the first being as follows: The jurors for the State, upon their oath present, that Thomas Maslin, late of the county of Forsyth, on 7 March, A.D. 1921, at and in the county aforesaid, being then and there an officer, agent and director of the Merchants Bank and Trust Company, a corporation duly created, organized and existing and operating under the banking laws of North Carolina, and engaged in the banking business in the city of Winston-

Salem, county and State aforesaid, unlawfully, wilfully and feloniously did embezzle the sum of nine thousand seven hundred and seventy dollars of the moneys, funds and credits in the possession of, and held in trust by the said Merchants Bank and Trust Company, belonging to one E. K. Polites, with intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

In the second count the word "abstract" takes the place of "embezzle" in the first, and the words "with intent to defraud" in the first are changed in the second into the phrase "with intent to defraud and injure the said Merchants Bank and Trust Company and the said E. K. Polites."

The third count is a transcript of the second with the word "misapply" substituted for "abstract."

The jury returned a general verdict of guilty and from the judgment pronounced the defendant appealed upon exceptions and assignments of error referred to in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Swink, Clement & Hutchins and F. P. Hobgood for defendant.

ADAMS, J. In addition to demurring thereto the defendant moved to quash each count in the bill of indictment. He assails the first on the ground that it contains no description of the funds, no recital of the number of transactions composing the embezzlement, no averment that the funds came into his actual possession by reason of his official relation to the bank, or that he converted them to his own use, or that he did any of the forbidden acts with intent to defraud or injure the bank or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine its affairs.

As to the second count it is objected that it has no averment of a description of the funds, of the number of transactions, or of loss to the bank by reason of the abstracted funds, or that the abstraction was made without the consent of the bank, or with intent to defraud the bank or any person or corporation, or to deceive the bank or its examiner. Similar objections are made to the third count, which charges the misapplication of moneys, funds, and credits in the possession of and held in trust by the bank. The motion and the demurrer were overruled and the defendant excepted.

This ruling was free from error. The statutes which were in effect at the time the several acts are charged in the indictment to have been committed denounce the embezzlement, the abstraction, and the misapplication of a bank's moneys, funds, or credits by any of its officers, agents, or directors. C. S., 4401, 224(e). The act which amended section 224(e) (*Toomey v. Lumber Co.,* 171 N. C., 178) was ratified and made effective on 25 February, 1927. Public Laws 1927, ch. 47, sec. 16.

Embezzlement was not an offense at common law. *S. v. McDonald,* 133 N. C., 680. It is made a crime by statute; and ordinarily an indictment will be deemed adequate if it charges the defendant with all the acts embraced within the statutory definition, or if it employs so many of the substantial words of the statute as will enable the court to determine the one on which it is framed. 2 Bishop's Crim. Procedure, sec. 611 *et seq.;* 1 Wharton's Crim. Law, (11 ed.), sec. 230, n. 2; *S. v. Heaton,* 81 N. C., 543; *S. v. Sauls,* 190 N. C., 810. Tested by this principle each of the counts is sufficient in law.

An analysis of the first count discloses these component averments: (1) the defendant was an officer, agent, and director of the bank; (2) moneys, funds, and credits, the property of E. K. Polites, were in the possession of and were held in trust by the bank; (3) the defendant unlawfully, wilfully, and feloniously embezzled $9,770 of these funds, with intent to defraud. The agency, the receipt of the property in the course of business, the name of the owner, and the embezzlement are clearly set forth. It was not necessary to aver or to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. *S. v. Gulledge,* 173 N. C., 746. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The word "embezzle" has a technical meaning. "It is believed that the single statutory words, 'did embezzle,' sufficiently indicate the criminal act; just as 'did burn' in arson, 'did make an assault,' in assault, 'did solicit' in attempt, 'did break and enter' in burglary, and 'did conspire' in conspiracy, are alone adequate, being the terms most adequately expressing the idea, and requiring and admitting no aid from circumlocution." 3 Bishop's New Crim. Procedure, sec. 322. In the indictment under review in *S. v. Lanier,* 89 N. C., 517, the charge was expressed in the words "and the said money then and there fraudulently and feloniously did embezzle." There was an additional averment of larceny, but the Court held that it might be disregarded as superfluous and that the charge of embezzlement was adequate; this for the reason that "to embezzle" means to misappropriate as well as to convert to one's own use. *S. v. Foust,* 114 N. C., 842. The intent to defraud was sufficiently set out without specifically naming any particular victim of the preconceived purpose. C. S., 4621; *S. v. Switzer,* 187 N. C., 88.

As we have not discovered any fatal defect in the first count the verdict would not be vitiated by insufficiency of the second or third. The jury convicted the defendant upon a general verdict which covers all the counts, and if either count is good the verdict will be upheld because the offenses charged are of the same grade and punishable to the same extent. *S. v. Hammond,* 188 N. C., 602; *S. v. McAllister,* 187 N. C., 400; *S. v. Strange,* 183 N. C., 775; *S. v. Klingman,* 172 N. C., 947. But we do not intimate that the last two counts are in anywise defective. They are laid substantially in the language of the statute and this, as we have said, is ordinarily regarded as meeting the demands of the law in this respect. It is safe but not essential to pursue the words of a statute. *S. v. Heaton, supra.* The objection that there is nothing in the indictment to indicate the number of abstractions, if more than one, is removed by the discussion and decision of the question in *S. v. Switzer, supra.*

Several exceptions relate to expert testimony which was admitted to elucidate certain entries in the books of the bank. The objection is that the entries were free from ambiguity and that parol evidence was not admissible in explanation. The principle that as a rule parol evidence cannot be received to contradict, alter, or modify the terms of a written instrument which speaks for itself has no application here. The evidence was offered for the purpose of tracing sundry entries on the books through a series of transactions which tended to show that funds had been taken from the trust account and elsewhere applied. It is hard to see how the jury could have understood the significance of these entries without the aid of expert testimony, or how they could have taken the books and satisfactorily have traced any of the funds while making up their verdict. The entries were not changed; their meaning was explained. There was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. *S. v. Hightower,* 187 N. C., 300. Neither these exceptions, nor others taken to Shapiro's conversation with the defendant, point to the admission of any evidence which could have been prejudicial in law to the rights of the defendant. For this reason they must be overruled.

On cross-examination the defendant was asked whether he was then under indictment for abstracting and embezzling funds belonging to the Merchants Bank and Trust Company, for the embezzlement of trust funds deposited in the same bank by the Snipes estate, and for receiving into the bank certain moneys for deposit when he knew the bank was insolvent. His objection to each question was overruled and to each, reserving his exceptions, he gave an affirmative answer. Should this evidence have been excluded?

When the defendant took the stand his status was two-fold—that of defendant and that of a witness. As a person accused of crime his character could not be evidenced by the State until he had put it in issue; but as a witness, his character was subject to impeachment. 4 Wigmore on Evidence, sec. 2277. It was only for the latter purpose that the evidence was admitted. *S. v. Traylor,* 121 N. C., 674.

It may be conceded that the decisions of some other courts sustain the defendant's position; others do not; we are therefore concerned chiefly with our own. In *S. v. Patterson,* 24 N. C., 346, 359, a question was raised as to how far a witness should be compelled to answer questions which, without charging him with crimes, tended to his disparagement or disgrace; and it was held that such questions were permissible, the only doubt being whether before the act of 1881 (C. S., 1799), the witness could refuse to give an answer. And in *S. v. Garrett,* 44 N. C., 357, it was said that if a witness refused to say on cross-examination whether he had been convicted of an infamous crime his silence should be a proper subject of comment before the jury. The latter decision was followed in *S. v. Lawhorn,* 88 N. C., 634, which in turn has been approved in *S. v. Spurling,* 118 N. C., 1250; *S. v. Holder,* 153 N. C., 606; *S. v. Winder,* 183 N. C., 776; *S. v. Spencer,* 185 N. C., 765, and *S. v. Jeffreys,* 192 N. C., 318. In the case last cited the defendant on cross-examination was asked this question: "Why didn't you ask that man out at Mordecai what he wanted you for and what did they arrest you on Hillsboro Street one time for?" The question was held to be competent for the purpose of impeaching the defendant as a witness; and in *Colson's case* the questions propounded to the defendant for the purpose of impeachment, and held to be competent, were whether he had not violated the prohibition law and whether he had not adjusted in court a charge that he had failed to support his wife. *S. v. Colson,* 194 N. C., 206. Evidence of a mere accusation of crime should be excluded. *S. v. Wiggins,* 171 N. C., 813. But an indictment duly returned as a true bill, while in a sense an accusation, is much more than a bare charge: it is an accusation based upon legal testimony and found by the inquest of a body of men, not less than twelve in number, selected according to law and sworn to inquire into matters of fact, to declare the truth, and as preliminary to the prosecution to find bills of indictment when satisfied by the evidence that a trial ought to be had. *S. v. Stewart,* 189 N. C., 340; *S. v. Walker,* 32 N. C., 234; *S. v. Tomlinson,* 25 N. C., 32; *S. v. Christmas,* 20 N. C., 545.

Questions of this kind have been generally indulged in the practice and permitted in the trial courts, and if the decisions heretofore cited are to be recognized as the law it is manifest that there was no error in overruling the exceptions on this point.

No error.

WILLIAM EDWARD TANKERSLEY, MINOR, BY HIS NEXT FRIEND, J. W. TANKERSLEY, v. MATTIE BISHOP DAVIS ET AL.

(Filed 2 May, 1928.)

Deeds and Conveyances—Construction and Operation—Estates and Interests Created—Adopted Children.

A deed to the grantor's daughter conveying the lands to be held, with remainder over as designated thereinafter, with *habendum* to her for her natural life then over to any child or children she may leave surviving her in fee, qualified by the expression, should any child or children born unto her predecease her, the other such children should take in fee, with an ultimate and further contingent limitation over: *Held,* giving the intent of the testator controlling significance, a child adopted after the death of the grantor, no other child having been born, is excluded as against the ultimate takers of the blood of the grantor provided by the deed. C. S., 185.

CIVIL ACTION before *Lyon, Emergency Judge,* at March Term, 1928, of GUILFORD.

The facts are as follows: On 12 November, 1923, J. C. Bishop executed and delivered to his daughter, Bonnie B. Tankersley, a deed for a certain lot of land. The conveying clause of the deed was "unto the said party of the second part to have and to hold and then in remainder, as hereinafter set out and not otherwise." The *habendum* clause was "to the said party of the second part for and during the term of her natural life and thereafter to any child or children she may leave surviving her in fee, and in the event that any child or children she may have had born unto her shall have predeceased her, then the child or children of any dead child or children shall represent and take such interest and estate as his, her, or their parent or parents would have taken had he or she survived the party of the second part, and in the event that the said party of the second part shall leave no child or children nor the representative of such, surviving her, then to Mrs. Mattie V. Davis, wife of A. C. Davis," etc. The deed was duly recorded. The only children of the grantor Bishop at the time of making the deed were Bonnie B. Tankersley and Mattie V. Davis. On 6 April, 1927, or about three and a half years after the registration of said deed, Bonnie B. Tankersley and her husband, J. W. Tankersley, duly adopted a son of a deceased brother of J. W. Tankersley, the husband of Bonnie B. Tankersley, and said adopted child was not related by blood to Bishop, the grantor, or to Bonnie B. Tankersley, the grantee. The minor plaintiff had been living in the home of J. W. Tankersley and Bonnie B. Tankersley for several months prior to the date of the deed. Bonnie B. Tankersley had no children and died on 14 April, 1927. The plaintiff, the adopted child of Bonnie B. Tankersley, claims the property under the Bishop deed. The defendant, Mattie Davis, and her daughter Virginia Bishop Davis, claim the property under the deed of Bishop.

The cause was submitted to the judge upon the foregoing facts, who was of the opinion and so adjudged that the title to said land is vested in Mattie Bishop Davis and that the plaintiff was not entitled to the property, from which judgment plaintiff appealed.

Hines, Kelly & Boren for plaintiff.
King, Sapp & King for defendants.

BROGDEN, J. The question is this: Under the deed of Bishop who is entitled to the land, the adopted child of Bonnie B. Tankersley or the sister of Bonnie and the children of said sister?

C. S., 185, provides in substance that if the adoption is for life the adopted child by virtue of the adoption is enabled "to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it," etc.

The question of inheritance is not involved in this case because the takers of the property hold under the deed of Bishop and not by inheritance from Mrs. Tankersley. The inevitable trend of modern authority is to the effect that a deed must be construed in its entirety in order to ascertain the intention of the parties thereto, and neither "antiquated technicalities" nor strained construction is permitted to nullify the intention of the grantor. *Triplett v. Williams,* 149 N. C., 394.

The words of the deed "during the term of her natural life, and thereafter to any child or children she may leave surviving her in fee," nothing else appearing, would undoubtedly vest the title of the property in the adopted child. But something else does appear, to wit, "and in the event that any child or children she may have had born unto her shall have predeceased her, then the child or children of any dead child or children shall represent and take such interest," etc. The word "born" implies blood. Certainly our statutes of descent, in most instances, search for the blood of the deceased with the same unerring discrimination as manifested by the "Destroying Angel" that passed over Egypt in the days of Moses.

The defendants contend that a proper construction of the deed means that if the deceased Bonnie Tankersley had an adopted child, the property would go to the adopted child; but if she left a "born child," the children of such born child should represent the ancestor or ancestors, whereas the children of an adopted child would have no such right.

This, we think, is a strained construction of the deed. It is what the accountants might call a "forced balance." The adoption took place three and a half years after the deed was made. So that no adoption existed at the time of its execution. It is hard to conceive how the grantor contemplated an artificial status that did not even exist. Moreover the grantor on or about the same time he executed the deed in controversy, delivered to his other daughter, Mrs. Davis, a deed in identical language. It would appear that a plain common-sense construction of the instrument would develop the conclusion that the grantor intended to keep his property "in the family." It is perhaps significant that the adoption took place only eight days before the death of Bonnie Tankersley.

The defendants rely upon *Butterfield v. Sawyer,* 187 Ill., 598, 52 L. R. A. (O. S.), 75. The deed involved in that case contained no language indicating a blood relationship. The deed conveyed the property to a life tenant, "the remainder to her child or children that may be living at the time of her decease, and to the heirs and assigns of such child or children forever, and, in default of child or children of the said Adeline Butterfield at the time of her decease, then to the heirs generally of the said Adeline Butterfield forever," etc. The court held that the adopted child received the property under the expression "heirs generally," and even this decision was rendered by a sharply divided Court. The contrary view is discussed by the Supreme Court of Pennsylvania in the case of *Re Puterbaugh,* 104 Atlantic, 601, 5 A. L. R., 1277. The annotation in 5 A. L. R., assembles the authorities upon the question. In that case the testator devised certain property to his son during his natural life "and at his death . . . to his child or children and their heirs . . . and in the event he died without leaving any child or children, then over." The Court inquired: Whom did the testator understand to be contemplated within the words "children of Harrison S.," as he here employed them? The Court said: "A circumstance which we think, however, goes very far in support of appellants' contention, is that the adoption of this appellee occurred four years after the death of the testator, and nothing is to be found in the will suggesting that, so far as testator knew, the adoption of a child was then contemplated. Not a single extrinsic fact can be pointed to as indicating that the testator intended that anyone not of his blood should share in his bounty, while the will itself may be searched in vain for any indication tending even remotely to show that he so intended." The effect of the decision is stated in the first head-note in this language: "A child adopted after death of testator is not within a provision of the will giving a life estate to testator's son, and after the death of the son to his child or children."

Both the *Butterfield case* and the *Puterbaugh case* represent divergent views, based, no doubt, upon variable wording in the adoption statutes. Suffice it to say that we plant our decision squarely upon the construction of the deed and hold that the language of the deed itself excludes the adopted child.

Affirmed.

RICHMOND COUNTY v. PAGE TRUST COMPANY ET AL., RECEIVERS OF THE BANK OF HAMLET, AND T. M. ROSE ET AL., DEFENDANTS, AND N. A. BERRY AND HIS WIFE, MARY H. BERRY, INTERVENORS.

(Filed 2 May, 1928.)

1. **Assignments—Rights and Liabilities of Parties—Right of Prior Assignee—Equity—Banks and Banking.**

   While a bank may make a valid transfer of certain of its assets to secure the officers thereof in signing as sureties an undertaking given by the bank for the deposit of county funds (*Trust Co. v. Rose*, 192 N. C., 673), such transfer will not prevail as against an equity of a third person to whom the same assets had been previously assigned and the later assignment was in fraud of rights acquired, and where these matters are sufficiently alleged a demurrer thereto is bad.

2. **Equity—Between Equal Equities the First in Point of Time Prevails—Banks and Banking.**

   In the course of its dealings and for a lawful purpose a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by 3 C. S., 220(a); and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail.

APPEAL by plaintiff, and defendant, T. M. Rose, from *Oglesby, J.*, at November Term, 1927, of RICHMOND. Affirmed.

This action involves the title to certain notes described in the complaint. These notes are now held by defendants, receivers of the Bank of Hamlet. The controversy is primarily between the defendants, T. M. Rose and others, and the intervenors. Each claims under an assignment of said notes, made by the Bank of Hamlet. Prior to said assignments, the Bank of Hamlet owned the said notes and held the same as part of its assets.

On 8 September, 1925, the said notes were assigned by the Bank of Hamlet to defendant, T. M. Rose, to indemnify the said Rose and others, from loss on a bond executed by the Bank of Hamlet, as principal, and the said Rose and others as sureties, to the plaintiff in this action. The said bond was conditioned for the payment, on demand, by the Bank of Hamlet to the plaintiff, as obligee, of a sum of money deposited by the plaintiff with said bank. There has been a breach of said bond by the Bank of Hamlet, which is now insolvent.

The plaintiff alleges that as obligee in said bond, it has an equity, by reason of the assignment of said notes for the protection of the sureties, to have the proceeds of said notes, when collected, applied in discharge of the liability of the principal on said bond to plaintiff. It demands judgment in this action on the bond, and prays that the receivers of the Bank of Hamlet be ordered and directed to collect said notes, and to apply the proceeds of such collection to the satisfaction of its judgment.

The intervenors allege that the assignment of said notes by the Bank of Hamlet to defendant, T. M. Rose, is void, for that said assignment was fraudulent; they allege that they are the owners of said notes under a valid assignment made to them by the Bank of Hamlet, prior to the date of the assignment under which plaintiff and defendants, T. M. Rose and others, claim; that the assignment to them was made to secure certain certificates of deposit issued by the Bank of Hamlet and now owned by them.

From judgment overruling demurrers filed by each of them to the cross-complaint of the intervenors, plaintiff, and defendant, T. M. Rose, appealed to the Supreme Court.

W. Steele Lowdermilk for plaintiff.
Rose & Lyon for defendant, T. M. Rose.
Robinson, Caudle & Pruett for intervenors.

CONNOR, J. In *Trust Co. v. Rose,* 192 N. C., 673, we held that the assignment of the notes described in the complaint in this action, made by the Bank of Hamlet to T. M. Rose, was valid, and that as between the receivers of the Bank of Hamlet, which had become insolvent, subsequent to the date of said assignment, and the said T. M. Rose, the latter was the owner of said notes, by reason of the assignment. This assignment was made to indemnify the said Rose and others from loss on the bond executed by the Bank of Hamlet, as principal, and the said Rose and others, as sureties, to the plaintiff in this action. The validity of the assignment was attacked by the receivers of the Bank of Hamlet on two grounds, first, because it was executed on behalf of the bank, without express authority of its board of directors, by its vice-president and cashier, for the protection of its officers, who were the sureties on the bond, and, second because the Bank of Hamlet was without power, in the absence of statutory authority, to transfer or assign any part of its assets to secure one or more of its creditors. Upon the facts agreed, and submitted to the Court, in a controversy without action, we held that the contentions of the receivers could not be sustained upon either ground. We reversed the judgment of the Superior Court from which T. M. Rose and his cosureties had appealed. Judgment has since been entered in the Superior Court of Richmond County in accordance with our decision, and with the opinion filed in support of the same. In said judgment it is ordered and decreed that the receivers of the Bank of Hamlet shall hold said notes, as trustees for T. M. Rose and his cosureties on the bond, and shall apply the proceeds of said notes when the same are collected by them, in discharge of the liability of the Bank of Hamlet to the plaintiff herein, and thus indemnify and save harmless the sureties on its bond. This judgment was rendered at March Term, 1927, of the Superior Court of Richmond County.

This action was begun on 27 June, 1927. Plaintiff demanded judgment on the bond, and prayed that the receivers of the Bank of Hamlet be ordered and directed to pay to plaintiff, as obligee in the bond, all sums collected by the said receivers on the notes held by them in discharge of its judgment.

On 23 July, 1927, N. A. Berry and his wife, Mary H. Berry, upon their motion, were made parties to the action, and were allowed to intervene therein, and set up their claim to the notes described in the complaint. On the same day they filed an answer to the complaint and a petition, in the nature of a cross-complaint against the plaintiffs, the receivers of the Bank of Hamlet, and the defendants, T. M. Rose and others. Plaintiffs and defendant, T. M. Rose, each filed a demurrer to the cross-complaint of the intervenors for that the allegations contained therein do not state a cause of action. Upon the hearing, these demurrers were overruled. From the judgment overruling their demurrers, plaintiff and defendant, T. M. Rose, appealed to this Court.

The questions presented for decision upon this appeal, are, first, whether the assignment under which the intervenors claim title to the notes described in the complaint, upon the facts alleged in their cross-complaint, and admitted by the demurrers, is valid, and second, if so, whether the title acquired by the intervenors in and to said notes, under said assignment, is superior to the title acquired by defendants, T. M. Rose and others, under the subsequent assignment of said notes, and also to the equity alleged by plaintiff in this action, founded upon said assignment.

Both these questions must be answered in the affirmative—the first upon the authority of *Trust Co. v. Rose,* 192 N. C., 673, and the second upon well settled principles of equity. "Where equities are equal, the first in time will prevail." The assignment of the notes by the Bank of Hamlet to T. M. Rose, while good as against the bank, and the receivers, upon the facts agreed, and submitted to the Court in *Trust Co. v. Rose,* may not be valid as to the intervenors, in this action, who attack the assignment for fraud. The distinction which appellants undertake to make between the facts upon which *Trust Co. v. Rose* was decided, and the facts alleged in the cross-complaint and admitted by the demurrers in the instant case, is not sustained on principle. In this State, banks, organized under its laws and carrying on business pursuant thereto, have the power not only to discount, but also to negotiate promissory notes, drafts, bills of exchange and other evidences of indebtedness. 3 C. S., 220(a). The power to negotiate involves the power to sell as well as the power to buy, and includes necessarily the power to assign or transfer. Black's Law Dict., p. 812. There is no statutory limitation upon the power of a bank to assign or transfer its assets, or any part of the same for any lawful purpose.

As the allegations of the cross-complaint will doubtless be denied in the answers thereto, which appellants are authorized to file, by the judgment overruling their demurrers, we refrain from passing upon questions discussed in the briefs, filed upon this appeal. The pertinency of these questions depends upon the facts as they may be determined by the verdict of the jury. There is no error in the judgment overruling the demurrers, and allowing appellants time to answer as they may be advised. The judgment is

Affirmed.

H. C. AMMONS v. ST. PETER'S HOSPITAL, INCORPORATED.

(Filed 2 May, 1928.)

Negligence—Acts and Omissions Constituting Negligence—Condition and Use of Land—Obstructions.

One who is injured at night, while attempting to carry a patient into a hospital, by tripping over an unseen wire strung around a grass plot to prevent trespassing thereon cannot recover damages therefor against the hospital, the injury being due to an accident.

APPEAL by plaintiff from *Oglesby, J.,* at March Term, 1928, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff when he fell over a wire, strung along a walk in the front yard of defendant's premises, and broke his leg.

The evidence tends to show that on the night of 27 December, 1926, the plaintiff, in company with a friend, was traveling by motor from Red Springs to Charlotte, N. C. About nine miles from the city of Charlotte, they came upon three men, who had been injured in an automobile wreck. The plaintiff and his friend ministered to the wounded men, placed them in their car and hastened with them to St. Peter's Hospital. This was about 10:00 p. m. The night was dark and rainy. Upon arriving at the hospital, plaintiff drove to the side entrance, at the suggestion of one of the men, and sought to gain admittance there. Failing to get any response from several rappings on the side door, the plaintiff, to use his own language, "feeling like minutes were hours in that critical moment," started around to the front entrance. "As I got by the corner of the hospital I noticed a walkway—what I taken to be a walkway—across the lot, and to make a narrow cut, I went that way—went across the lot, got nearly to the front steps when I tripped on a wire and was thrown to the steps and my leg was broken. I did not see the wire."

As a matter of fact, plaintiff was not in a walkway when he fell, nor had there ever been one there. The wire in question was strung a few inches from the cement walkway leading from the street to the front steps of the hospital. It was put up to keep people from walking over the grass, and consisted of two strands, strung on iron posts about 18 inches high, and was placed around the entire grass plot. Plaintiff had to cross the wire in order to get on the grass plot. He tripped and fell in coming out of the circle.

From a judgment of nonsuit, entered at the close of all the evidence, the plaintiff appeals, assigning error.

Whitlock, Dockery & Shaw for plaintiff.
Hamilton C. Jones and Taliaferro & Clarkson for defendant.

PER CURIAM. Plaintiff was the victim of an unfortunate accident while acting the part of a good Samaritan, but, on the record, the St. Peter's Hospital, Inc., cannot be held legally liable for his injuries.

Affirmed.

JOHN W. MOORE v. ISRAEL SCHWARTZ.

(Filed 2 May, 1928.)

Gambling—Action Will Not Lie Against Maker of Check Given for Gambling Debt.

An action will not lie to recover against the maker upon a note given for a gambling debt.

CIVIL ACTION before *Harding, J.*, at December Term, 1927, of MECKLENBURG.

The defendant was indebted to the plaintiff for $183.00 and plaintiff brought suit in a magistrate's court against the defendant to recover that sum. At the trial the defendant admitted the indebtedness to the plaintiff but set up as a counterclaim a check for $170.00, payable to "cash." The plaintiff denied the legality of the counterclaim and offered evidence tending to show that the check for $170.00 was given by him to one Familant to pay losses incurred in a poker game. Familant had endorsed the check to the defendant. There was no evidence contradicting the evidence of the plaintiff that the check sought to be used as a counterclaim by the defendant was given for the purpose of paying a gambling loss. Whereupon the judge instructed the jury to answer in the affirmative the issue relating to whether or not the check was a wagering contract. From judgment for plaintiff for the amount of his account and denying recovery on the counterclaim the defendant appealed.

Thomas W. Alexander for plaintiff.
J. D. McCall for defendant.

PER CURIAM. Gaming contracts are covered by C. S., 2142. Such contracts are void and cannot be enforced in a court of justice. *Orvis v. Holt,* 173 N. C., 231; *Bank v. Crafton,* 181 N. C., 404.

Under certain circumstances the holder of a check or a note given to pay a gambling debt may recover against the endorser. *Bank v. Crafton, supra.* This is not such a case as the endorser is not sued.

No error.

TOWN OF WAXHAW v. S. A. L. RAILWAY CO.

(Filed 2 May, 1928.)

Municipal Corporations—Public Improvements—Assessments—City May Levy Assessments for Improvement of One Side of Street.

An assessment levied for street improvements on abutting property owner, C. S., 2707, is not void on the ground that the assessment was for improving only one side of a street.

APPEAL by defendant from *MacRae, Special Judge,* at October Special Term, 1927, of UNION. No error.

Vann & Milliken for appellant.
John C. Sikes and H. B. Adams for appellee.

PER CURIAM. The defendant's right of way extends through the town of Waxhaw approximately in an eastern and western direction. According to the map filed in the cause, North Front Street, or North Main Street, is on the north side of the right of way and South Front, or South Main Street, on the south. In 1927 the State Highway Commission paved that part of the Jackson highway extending through the town along South Main Street. The pavement laid by the commission was 18 feet wide and on each side of it was an unpaved portion of the street about 11 feet in width. After this work had been completed or while in process of completion, certain property owners of the town, representing a majority of the owners and of all the lineal feet of frontage on the south side of South Main Street filed a petition with the governing authorities pursuant to the provisions of C. S., 2707, asking that a hard surface be laid on the area between the Jackson highway and the sidewalk on the south side. On 15 October, 1926, the commissioners passed a resolution providing for an assessment of the adjoining property on the south side of the street, and on 21 April, 1927, they passed a resolution assessing three-fourths of the cost of the improvement against the owners of property on the south side. The defendant owns a vacant lot abutting the improvement and filed objections to the confirmation of the assessment and insisted that the plaintiff had never acquired title or right to the use of the street in question and that the petition filed in the proceeding did not comply with section 2707. The objections were overruled, the defendant appealed to the Superior Court and upon the trial the only issue submitted to the jury was whether the way in front of the defendant's property on which an assessment had been levied was a public street of the town. The issue was answered in the affirmative and from the judgment of the court the defendant appealed assigning error. The insufficiency of the petition was not pressed.

The record contains several assignments of error but upon the argument the only objection seriously insisted upon by the defendant was that which related to the insufficiency of the judgment, the defendant contending that the commissioners of the town were not authorized to levy an assessment for paving only one side of the street. The plat on file indicates one street on the south side of the right of way and another on the north and it is insisted in the brief of the appellee that the two are recognized in the plan of the town as separate and distinct streets. However this may be, we are of opinion that section 2707 in express terms permits the authorities of the town to lay a hard surface on a part of a street as well as on the whole, and that there is nothing in the statute indicating that the "part thereof" necessarily excludes a lateral pavement and applies only to a cross section. The record shows that the only property abutting the north side of South Main Street is the defendant's right of way. Upon the entire record we find

No error.

STATE v. LARRY NEWSOME.

(Filed 9 May, 1928.)

1. Criminal Law—Evidence—Confessions—What Constitutes Promise or Threat.

Only free and voluntary confessions of one accused of crime, uninfluenced by a promise of favor or a threat, are competent on the trial as evidence against him, but a confession is not rendered involuntary because made to officers of the law having the defendant under arrest at the time.

2. Same.

Confessions of a defendant while under arrest are not rendered inadmissible at the trial on the ground that at the time of his making them the officers of the law having him in custody assured him that they would protect him from mob violence feared by him.

3. Same—Confidential Communications—Physicians and Surgeons.

The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient mental capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and C. S., 1798 is not applicable.

4. Same—Cured Error—Instructions.

Where the evidence is cumulative as to the confessions of one accused of crime, the error, if any, in the admission of evidence of one of the confessions, is cured by the trial court when he clearly withdraws the evidence from the consideration of the jury.

5. Homicide—Murder—Murder in the First and Second Degrees—Elements Thereof—Instructions—Presumptions.

Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. C. S., 4642.

6. Criminal Law—Appeal and Error—Assignment of Error—Defendant Must Assign Error to Have it Considered in the Supreme Court.

The question as to whether the defendant is entitled to a new trial on the ground that the verdict was influenced by hostile demonstrations in the courtroom during the trial, must be raised by the defendant by motion for a new trial and exception to the refusal of the trial court to grant same.

ADAMS, J., concurring, STACY, C. J., and BROGDEN, J., concurring in result, CLARKSON, J., dissenting.

APPEAL by defendant from *Grady, J.*, at December Term, 1927, of WAYNE. New trial.

Indictment for murder. Verdict: Guilty of murder in the first degree.

From judgment on the verdict, that defendant suffer death as provided by statute, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Madrid B. Loftin for defendant.

CONNOR, J. The lifeless body of Beulah Tedder was found by her father, Alex Tedder, between 6:30 and 7 o'clock p. m. on Thursday, 8 December, 1927, lying beside a path, thirty-five or forty yards from his home, in Wayne County, N. C. The path beside which the body was found runs from the home of Cora Reid to the home of the father of the deceased. She was lying flat on her back, with her head turned to one side, and with one leg drawn up under her body. Her dress was thrown back towards her shoulders. Her throat was cut; there were also cuts on her cheeks, her arms and her hands. The evidence tended to show that these cuts were made with a knife, at or near the place where the body was found, by some person who, at the time, was assaulting her with a knife and that she was attempting to escape from her assailant. The county physician who examined the body the next day after it was found by her father, about 10 o'clock a.m., testified that from his examination he was convinced that the deceased had not been ravished. She was a strong, well-developed girl, about fourteen years of age, weighing about 115 pounds. There was no evidence tending to show that the deceased had been ravished, or that the homicide had been committed in the perpetration of a rape upon the deceased.

The deceased was the oldest child of her father's family. She had left his home that evening about 6 o'clock with Cora Reid, a neighbor, whose home was at a distance of about 2,200 feet from her father's home. She went with Cora Reid to her home, at her father's request, to get some home-made syrup for the family. After she and Cora Reid arrived at the home of the latter, the deceased remained there for about five minutes. She then left, with the syrup, going in the direction of her father's home, along a path near which, at a distance of about 1,000 feet from the home of deceased's father, was situate the home of defendant, Larry Newsome. There was evidence tending to show that defendant was at his home, when deceased and Cora Reid passed the same, going to the home of the latter, walking together along the path, and that defendant saw them as they passed. He knew that deceased would later return to her father's home, by this path, alone. There was evidence tending to show further that defendant waylaid the deceased as she was returning from the home of Cora Reid to the home of her father, about 6:30 o'clock, and that he killed her by cutting her throat with a knife.

There was also evidence tending to show that defendant met the deceased, as she was returning from the home of Cora Reid to her father's home, near defendant's home, and that he then and there assaulted her, with intent to commit rape upon her. This assault, made about 125 to 140 yards from the place at which the body of the deceased was found, was not successful. The deceased broke away from defendant and ran toward her father's home. There was evidence tending to show that defendant pursued her with intent to commit rape upon her, and that he overtook her; that defendant killed her by cutting her throat with a knife, while attempting to perpetrate upon her the crime of rape.

There was evidence tending to show further that when defendant failed in his attempt to commit rape upon the deceased, at the time of his first assault upon her, because of her successful resistance, he abandoned his purpose to rape her, and that deceased escaped and ran from him; that as she was running toward the home of her father, she called to defendant, saying that she would tell her father of defendant's assault upon her, as soon as she arrived at his home; that defendant then pursued her a distance of 125 to 140 yards from the place where he first assaulted her, overtook her and again assaulted her with a knife with no intent to rape her, but with intent to prevent her from telling her father of the previous assault with intent to commit rape; that while making this latter assault upon deceased, defendant cut her throat with a knife, thus causing her death.

No evidence was offered by defendant; on cross-examination of witnesses for the State, defendant's counsel, assigned by the court to defend him in this action, sought to show that defendant's mental condition is such that he is not capable of committing crime. These witnesses testified that while in their opinion defendant is a man of low mentality, with the mind of a child of immature years, he had sufficient intelligence to know and did know right from wrong, and that he was capable of appreciating and did appreciate the moral quality of his acts. The sheriff of Wayne County, on his cross-examination as a witness for the State, testified "that he had been with the prisoner right much, while riding backwards and forwards, between different places; that in his opinion there are lots of people who have more sense than the defendant, but that defendant has plenty of sense to know right from wrong, and that defendant, in his opinion, has the intelligence of the average negro, without any education." Dr. W. C. Linville, psychiatrist for the State Hospital at Goldsboro, testified for the State that he had examined the defendant, since his arraignment upon the indictment in this action, in order to form an opinion as to his mental condition, and that in his opinion, formed as the result of such examination, defendant was at the time of the examination and also on the day of the homicide, sane. This witness on his cross-examination by counsel for defendant testified that defendant should be classed as a high-grade moron; that a high-grade moron is one whose mental faculties are undeveloped. On his redirect examination, the witness defined a moron as "a man without any education, a man with very poor training in life, and very poor ideas of law and order."

The only objection made by counsel for defendant to evidence offered by the State were directed to testimony of witnesses as to alleged confessions made to them by defendant, after his arrest, and while he was in the custody of the sheriff or his deputies. Two of these witnesses, J. R. Kornegay and Carl Smith, were deputy sheriffs of Wayne County. The other witness was Dr. W. C. Linville, the psychiatrist, who examined the defendant for the purpose of qualifying himself to testify as to the mental condition of defendant, at the time of the homicide. Each of these witnesses testified that the confession made to him, or in his presence, was voluntary on the part of defendant, and was made without promise or threat to defendant. The court overruled the objections, and defendant, having duly excepted upon his appeal to this Court, assigns the admission of testimony tending to show confessions by him as error.

With respect to the testimony of witnesses as to confessions of defendant, the court instructed the jury as follows: "Right here I want to say, and I feel it is my duty to say it: A confession of a prisoner who is charged with crime cannot be offered in evidence and received by the court and considered by the jury unless such confession is absolutely free and voluntary on the part of the person making it. If a person charged with crime is offered any inducement to confess, if any promises are made to him, or if he is threatened by any person, and under such threats, or by any coercion exercised upon him, he makes any admission or confession, the humanity of the law of this State will not permit that confession to be received in evidence. So in reference to the statements testified to by Mr. John Kornegay as to what the defendant told him after he left the penitentiary, and while he was on his way to Goldsboro:

I charge you not to consider any statement made to him, because after giving to his evidence mature thought and consideration I have decided that the promise that he made to the defendant while in the penitentiary that he would protect him, was there to protect him, was such a promise as would make any confession inadmissible in a court of justice. So when you go to make up your verdict, I charge you not to consider anything that Mr. Kornegay said as to confession made to him, or anything Mr. Carl Smith said as to confessions made to Mr. Kornegay while he was on the way from Raleigh to Goldsboro. However, this does not apply to the testimony of Dr. Linville. This testimony on the part of Dr. Linville as to what the defendant said to him, I consider competent evidence and it is permissible for you to consider it when you go to make up your verdict."

If the testimony of the witnesses, Kornegay and Smith, deputy sheriffs of Wayne County, as to statements, in the nature of confessions, made by defendant to the witness Kornegay, in the presence of the witness Smith, was incompetent and inadmissible as evidence against the defendant, for that said statements were made by the defendant in reliance upon assurances of the deputy sheriffs that they would protect him while he was in their custody, and if it was, therefore, error to overrule defendant's objections to the admission of this testimony, when same was offered by the State, such error was rendered harmless by the withdrawal of the incompetent testimony from the consideration of the jury in the charge. There was sufficient evidence other than the testimony as to confessions from which the jury could find that defendant is the man who killed deceased, by cutting her throat with a knife, and that the homicide was committed, either by lying in wait, or in the attempt to perpetrate a felony—to wit, rape, or after deliberation and premeditation by the defendant. The testimony as to the alleged confessions was cumulative as evidence with respect to these matters and its withdrawal from the jury rendered the error in its admissions, if any, harmless.

The principle upon which defendant's assignments of error with respect to the testimony of the witnesses Kornegay and Smith as to confessions made by defendant, are not sustained, is stated by *Adams, J.*, in *Hyatt v. McCoy*, 194 N. C., 760, as follows: "The admission of improper or incompetent evidence which is withdrawn from the jury and stricken out will not constitute reversible error, especially where the jury is particularly instructed not to consider it or to be influenced by it in making up the verdict." This principle has been applied by this Court not only in appeals in civil actions, as appears by the cases cited by *Adams, J.*, in *Hyatt v. McCoy*, but also in appeals in criminal actions. *S. v. Dickerson*, 189 N. C., 327; *S. v. Lane*, 166 N. C., 333; *S. v. Flemming*, 130 N. C., 688; *S. v. Ellsworth*, 130 N. C., 690; *S. v. Apple*, 121 N. C., 584; *S. v. Collins,* 93 N. C., 564; *S. v. May,* 15 N. C., 328. In the last cited case, *Ruffin, C. J.,* says: "If improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to receive it." In *S. v. Lane, supra, Walker, J.,* after restating the principle and applying it to an assignment of error in that case, says: "We cannot assume that the jury disobeyed the court's instruction, and considered the evidence, but we must presume the contrary, unless prejudice appears or is shown by the appellant in some way. The burden is on him to prove it. *Rush v. Steamboat Co.,* 67 N. C., 47; *Thomas v. Alexander,* 19 N. C., 385." In the instant case, there was evidence, other than the testimony of the witnesses Kornegay and Smith as to defendant's confessions, from which the jury could find that defendant is the man who killed deceased, and that he killed her as contended by the State, under circumstances that make the homicide, under the statute, murder in the first degree. The clear and full statement in the charge to the jury of the principles applicable to the admission of testimony tending to show confessions by the defendant, as evidence against him, and the vigorous language used by the learned judge in the instruction, withdrawing the testimony, and directing the jury not to consider it, cured the error, if any, in the admission of the testimony over the objections of defendant.

The fact that defendant was in the custody of the deputy sheriffs of Wayne County, who were taking him from the State's prison at Raleigh to Goldsboro, for trial, at the time he made the statements offered in evidence as confessions, does not render such statements incompetent and inadmissible as evidence against the defendants. This fact alone does not show that the confessions were involuntary. This is well settled by numerous decisions of this Court. *S. v. Bowden,* 175 N. C., 794; *S. v. Lowry,* 170 N. C., 730; *S. v. Lance,* 166 N. C., 411; *S. v. Jones,* 145 N. C., 466; *S. v. Exum,* 138 N. C., 599. In *S. v. Gray,* 192 N. C., 594, we said: "We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any." The assurance given to defendant by the officers before they left the State's prison, that they would protect him while he was in their custody, on the way to Goldsboro, cannot be held as an inducement to defendant to make statements to the officers with respect to the crime with which defendant was charged after they had left Raleigh, and while they were on the way to Goldsboro. This assurance was given to defendant, manifestly, because of apprehension expressed by him to the officers, that he would be attacked and subjected to violence after he had left the protection of the State's prison. The presiding judge withdrew from the jury the testimony of the witnesses Kornegay and Smith, as to defendant's statements to them, in the nature of confessions, evidently out of abundant caution, and because of his earnest desire that the defendant should not be prejudiced by testimony of confessions, as to the competency of which he had, after much reflection, some doubt. Upon the facts disclosed by the evidence, we do not think that there was error in overruling defendant's objections to the introduction of this testimony. We find no evidence showing that the statements made by the defendant to the officers, and offered by the State as confessions by him were otherwise than voluntary. But even if there was error in overruling the objections to this testimony when the same was offered, the error was cured by the withdrawal of the testimony in the charge to the jury.

The assignment of error based upon defendant's exception to the refusal of the court to sustain his objection to the testimony of Dr. Linville, as to statements made to him by defendant, offered in evidence as a confession by defendant, presents a more difficult question than that presented by the first and second assignments of error. It appears from the testimony of Dr. Linville that he is by profession a psychiatrist, and that he examined the defendant in a professional capacity. It does not appear, however, from his testimony, or from any other evidence before the court at the time defendant's objection was under consideration, at whose instance or at whose request, the examination of defendant was made by Dr. Linville. It does appear from a memorandum, filed in the record by the trial judge, and included in the case on appeal, as settled by him, with respect to an incident which occurred during the trial, having no connection, however, with this assignment of error, that counsel assigned by the court to defend the prisoner in this action visited the prisoner in jail, and that after a conference with him, advised the court that the only defense which they could possibly interpose in behalf of the prisoner was that of mental irresponsibility. Thereupon, at the request of counsel for defendant, the court communicated with Dr. Linville, the psychiatrist at the State Hospital for the Insane, at Goldsboro, and requested him to examine the prisoner, in order that he might form an opinion as to his mental capacity. The examination was made by Dr. Linville, in accordance with this request. Dr. Linville was thereafter called as a witness at the trial, and examined in behalf of the State. Defendant objected to testimony of this witness as to statements made to him by defendant, in the nature of confessions, while defendant was under examination by the witness, as a psychiatrist. The objection was overruled, and defendant excepted.

Dr. Linville testified that he examined the defendant on Saturday afternoon, about 1:30 o'clock; that he made a complete physical examination, and found no trouble with his heart, his lungs or his abdomen, but found a few minor defects such as might be found in an average person. He further testified as follows: "In my mental examination, I asked him about his past life, his occupation, and various incidents in his life. He told me that he had never had any disease, except the flu. He suffered from the flu for a short time. He seemed to know every thing in his past life, even the most minute details. He said he has staggering spells. I asked him if he lost consciousness at such times, and he said, 'Not as I know of.' I asked him about his father, and he said that his father also suffered from staggering spells. He said that they never fell or hurt themselves, but had kind of giddy feelings. I asked him about this occurrence which had just happened. He told me in detail of this occurrence. The examination was conducted in the presence of a deputy sheriff."

The witness was then asked if the defendant made a statement to him about the murder with which he was charged; he replied that he did. The witness then testified that he made no offer or inducement of any kind to defendant, nor did he threaten or coerce the defendant in any way; that defendant's statements to the witness were voluntary, and made in reply to questions asked him by the witness as to what caused him to commit the crime.

The witness then testified, subject to defendant's exception, as follows: "I asked him what caused him to do this, and he said 'I don't know.' I asked him if he cut the girl immediately after he came up with her. He said he did not; that he seized her around the waist, and she fought him off and ran from him. He said that he cut her after he caught up with her; that he cut her because she said she was going to tell her father."

There was no error in holding that the statements made by defendant to Dr. Linville, as testified by him, were voluntary. No promise was made to defendant to induce him to make the statements, nor was any threat used to extort the statements from the defendant. *S. v. Bridges,* 178 N. C., 733; *S. v. Bohannon,* 142 N. C., 695. The testimony of Dr. Linville was therefore competent, and properly admitted as evidence of a confession by defendant, unless the statements were privileged under the provisions of C. S., 1798. If the statements were privileged under this statute, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. *Ins. Co. v. Boddie,* 194 N. C., 199. Upon the facts, however, appearing upon the record in this case, we are of opinion that C. S., 1798, is not applicable. It does not appear that the relation of physician and patient, within the meaning of the statute, existed between Dr. Linville and the defendant, at the time the statements were made, nor that the information thereby obtained by Dr. Linville was necessary to enable him to prescribe for the defendant as his patient. It does not appear that defendant, at the time of the examination, was informed or knew that Dr. Linville had been requested to make the examination by his counsel, and that he relied upon the relationship of physician and patient, in making the statements. It is only when the relationship of physician or surgeon and patient has been established between the parties, and statements are made by the latter to the former, in reliance upon this relationship, for the purpose of affording information to the physician to enable him to prescribe treatment for the patient or to enable the surgeon to do some act for him as a surgeon, that the statute renders the statements inadmissible as evidence against the patient. Even then the judge may compel a disclosure by the physician or surgeon, if in his opinion the same is necessary to a proper administration of justice. See *Ins. Co. v. Boddie, supra.* It has been held in other jurisdictions that no professional relation precluding a disclosure of information acquired arises where a physician employed for that purpose alone makes an examination of a person charged with crime in order to pass upon his sanity, or to search for physical symptoms bearing upon his guilt or innocence. 40 Cyc., 2382 and cases cited. In the absence of evidence showing that a defendant in a criminal action, under examination by a physician for the purpose of enabling the physician to form an opinion as to his mental capacity, made statements in the nature of confessions, in reliance upon the relationship of physician and patient, it would seem that such statements are not privileged under our statute. C. S., 1798. Certainly they are not privileged, unless the relationship exists at the time the statements are made. It cannot be held upon the facts appearing on this record, that the relationship of physician and patient existed between Dr. Linville and the defendant at the time the alleged confession was made by defendant. Defendant's third assignment of error cannot be sustained.

The trial judge, in his charge to the jury, after stating in a plain and correct manner the evidence given in the case, and declaring and explaining the law arising thereon, as required by C. S., 564, gave the following instructions to the jury:

"I charge you that if you are satisfied from this evidence, and find beyond a reasonable doubt, that is, to a moral certainty, that the defendant killed Beulah Tedder, while lying in wait, or that he killed her while attempting to commit rape upon her person, or if not in either of these instances, that he killed her after premeditation and deliberation, as I have defined those terms to you, it would be your duty to return a verdict of guilty of murder in the first degree; but if you are not so satisfied, it would be your duty to return a verdict of not guilty."

"In this case I do not see and cannot arrive at any conclusion that would lead me to leave with you the question of his guilt upon charge of second degree murder or manslaughter; I therefore charge you that you can return but one of two verdicts in this case—either murder in the first degree, or not guilty."

The defendant excepted to the last instruction and assigns same as error. He contends that under the law of this State, as enacted by the General Assembly and as declared by this Court, and upon the evidence submitted to the jury in this case, it was error to instruct the jury that they could return only one of two verdicts—guilty of murder in the first degree, or not guilty; that the jury should have been instructed that although they should find from the evidence, beyond a reasonable doubt, that defendant killed the deceased with a deadly weapon, if they did not find further from the evidence, beyond a reasonable doubt, that he killed her while lying in wait, or in the attempt to perpetrate upon her person the crime of rape, they should return a verdict of guilty of murder in the second degree, unless they should find further from the evidence, beyond a reasonable doubt, that defendant killed the deceased after premeditation and deliberation, as those terms had been defined in the charge; that only upon such finding could the jury return a verdict of guilty of murder in the first degree, if they had failed to find that the murder was perpetrated by lying in wait, or in the attempt to commit the crime of rape. These contentions present a serious question which it is the duty of this Court to decide, in accordance with the law as enacted by the General Assembly of the State, and as heretofore declared in authoritative decisions of this Court. The rights not only of the defendant in the instant case, but of every person who may hereafter be called upon to answer a charge of murder in the courts of this State are involved in our decision.

In his charge, the court had correctly instructed the jury that they were not bound by the testimony of any particular witness or class of witnesses. He had said to the jury: "You are not bound to believe any witness or class of witnesses; but it is for you to say, after giving to the testimony of any witness that degree of scrutiny to which you think it is entitled, what weight you will give to such testimony when you retire to your room." It is for the jury to determine whether they believe or disbelieve all or any part of the testimony of a witness; they are the sole judges not only of the weight of the evidence, but also of the credibility of the testimony. "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury." C. S., 564. This statute was enacted in 1796; it has been in full force and vigor since its enactment. The wisdom of the policy upon which it was enacted and in accordance with which it has since been maintained as the law in this State is not for the courts to determine.

Since the enactment in 1893 of the statute dividing murder into the first and second degree, and defining each degree of the crime, it has been uniformly held by this Court that a homicide committed with a deadly weapon is presumed to be murder in the second degree and that in the absence of evidence tending to show facts which under the statute make the homicide murder in the first degree, or, on the other hand, facts which reduce the homicide to manslaughter, the jury should be instructed that if they find from the evidence, beyond a reasonable doubt, that the killing was done intentionally and unlawfully with a deadly weapon, they should return a verdict of guilty of murder in the second degree. It is provided by statute that "nothing in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." C. S., 4642.

The decisions of this Court, subsequent to the enactment of the act of 1893, and prior to the decision in *S. v. Spivey,* 151 N. C., 677, at Fall Term, 1909, in appeals presenting the question as to whether upon a trial for murder, under the usual form of indictment, it is ever permissible for the trial judge to instruct the jury that upon all the evidence, if they believe the same and find therefrom the facts to be as all the evidence tends to show, they could return only one of two verdicts—guilty of murder in the first degree, or not guilty—left the answer to this question in some doubt. In *S. v. Gadberry,* 117 N. C., 812, the question was decided in the negative, although there were strong dissenting opinions by *Clark, J.,* and *Montgomery, J.* In the opinion for the Court by *Furches, J.,* concurred in by *Avery, J.,* it was held that since the act of 1893, where on a trial of one charged with murder, although the defendant introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. In *S. v. Covington,* 117 N. C., 834, in the opinion by *Avery, J.,* for the Court, *Furches, J.,* having been of counsel in the court below, not sitting, it is said: "His Honor excluded from the jury the question of murder in the second degree and instructed them that in no view of the case as presented by the evidence was the prisoner guilty of murder in the second degree or manslaughter. To this the prisoner excepted. The charge is correct if there was no evidence of murder in the second degree or of manslaughter. The evidence relied upon by the State is the confession of the prisoner to the witness Josey and circumstances detailed by other witnesses tending to confirm it. Upon the truth or falsity of the confession the guilt of the prisoner entirely depends. If the confession of the homicide is a confession of murder in the first degree, and of neither manslaughter nor murder in the second degree, the charge is correct, for there is no evidence of either of these latter offenses. *S. v. McCormac,* 116 N. C., 1033."

However, in *S. v. Spivey,* 151 N. C., 677, *Manning, J.,* writing for a unanimous Court, says: "After a careful review of the decisions of this Court and a critical examination of the statute (Rev. 3631, now C. S., 4200, and Rev., 3271, now C. S., 4642), we deduce the following doctrine: Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, and where there is no evidence and where no inference can be fairly deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.' If, however, there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury."

The doctrine thus clearly stated is now and has since been the law in this State, with respect to this matter. *S. v. Gadberry* is expressly overruled in *S. v. Spivey.* In the former case all the evidence tended to show that defendant shot and killed deceased in an attempt to commit a felony, to wit, abduction. It is well settled, therefore, as the law of this State, that where all the evidence tends to show that defendant is guilty of murder, and that the murder was perpetrated by one of the means specified in the statute, or was committed in the perpetration of or attempt to perpetrate a felony, as defined in the statute, it is not error for the judge to instruct the jury that upon all the evidence, if they believe the same and find therefrom the facts to be as all the evidence tends to show, beyond a reasonable doubt, they should return a verdict of "guilty of murder in the first degree." In such case if defendant committed the murder, he is guilty of murder in the first degree, and the jury should so find by their verdict. In these instances the State is not required to prove deliberation and premeditation, because the means by which the murder was perpetrated, or the circumstances under which it was committed, show necessarily both deliberation and premeditation. When, however, the State relies upon evidence tending to show not only that the murder was perpetrated by one of the means specified in the statute, or that it was committed in the perpetration of or attempt to perpetrate a felony as defined in the statute, but also upon evidence tending to show deliberation and premeditation, the jury should be instructed that if they fail to find from the evidence, beyond a reasonable doubt, that the murder was perpetrated by one of the means specified in the statute, or that it was committed in the perpetration of or attempt to perpetrate a felony, and further fail to find from the evidence, beyond a reasonable doubt, that it was committed after deliberation and premeditation, they should return a verdict of guilty of murder in the second degree, provided, of course, they shall find from the evidence, beyond a reasonable doubt that the defendant committed the murder. Deliberation and premeditation, if relied upon by the State, as constituting the homicide murder in the first degree, under the statute, must always be proved by the evidence, beyond a reasonable doubt. In such case, under the statute as construed by this Court, it is for the jury and not the judge to find the fact of deliberation and premeditation, from the evidence, and beyond a reasonable doubt. Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge.

Applying these principles, we must sustain defendant's assignment of error based upon his exception to the instruction of the court to the jury. For the error of law, in said instruction, defendant is entitled to a new trial, and it is our duty, in the exercise of our appellate jurisdiction, conferred upon this Court by the Constitution of the State, to so decide.

It cannot be held as a matter of law that all the evidence in this case, and every inference fairly and reasonably to be drawn therefrom, required the jury to return a verdict of "Guilty of murder in the first degree," or of "Not guilty." A verdict of "Guilty of murder in the second degree" could have been returned by the jury under the law and the evidence in this case. The fact that the evidence fully justified the verdict as returned by the jury, does not affect the decision of the question which we are called upon to decide, upon this appeal. This Court has no jurisdiction to decide whether or not the defendant is guilty of murder as charged in the indictment, or, if guilty, whether he is guilty of murder in the first or second degree. We must decide only whether his assignments of error, duly presented upon his appeal, are sustained by the law of this State, as enacted by the General Assembly and declared by this Court. The decision of the trial court that, as a matter of law, upon all the evidence, defendant, if guilty, as charged in the indictment, is guilty of murder in the first degree, was error for which defendant is entitled to a new trial.

The court in its charge to the jury, had instructed them fully and correctly as to premeditation and deliberation, relied upon by the State, in part, to support its contention that defendant is guilty of murder in the first degree. The trial judge was of opinion that if the jury should fail to find beyond a reasonable doubt that the murder was committed by lying in wait, or in the attempt to perpetrate a felony, there was evidence tending to support the contention of the State that defendant killed deceased, with malice, after premeditation and deliberation; in this he was correct. But under the statute, whether or not the evidence established this fact, beyond a reasonable doubt, was for the jury to determine, and not for the judge. The distinction is not fanciful; it is vital. Upon this distinction rests the integrity of trial by jury, guaranteed by constitutional provision, and approved as the ultimate protection of the individual, in his rights of person and of property, by the experience of centuries.

Defendant further contends upon his appeal to this Court that he is entitled to a new trial, because of facts set out in a memorandum filed by the presiding judge, in the case on appeal, as settled by him, with respect to an incident which occurred during the progress of the trial. Defendant, while sitting in the bar, beside his counsel, was assaulted by the father and uncle of the deceased, with the evident purpose of taking him from the custody of the court. This assault was made during the examination of a witness for the State. Approval of the assault and of the purpose with which it was made, was manifested by persons in the court room. The purpose of the assault was promptly frustrated by the sheriff, who rescued defendant from his assailants. After the confusion in the court room, occasioned by the assault, had subsided, the trial proceeded in an orderly manner, resulting in the verdict, and judgment. No motion for a mistrial was made by defendant, nor does the record contain an exception to any ruling or decision of the court with respect thereto. There is therefore no assignment of error, which we can consider in the exercise of our appellate jurisdiction. Defendant contends, however, that upon the facts found by the judge, he should, of his own motion, have ordered a mistrial, and that it was error of law, for which he is entitled to a new trial, for the court to proceed with the trial, after this incident. We cannot so hold. We cannot hold that as a matter of law the presiding judge should have, without a request from defendant or his counsel, ordered a mistrial, because of this incident. It does not appear that counsel for defendant were intimidated by the assault upon defendant, or that they were deterred by the conduct of persons in the courtroom from making such motions as they thought the circumstances required for the protection of defendant's rights. The judge finds as a fact, as stated in the memorandum that, "during the foregoing demonstration the jury sat in perfect order and did not appear to be at all disturbed." In his charge to the jury, the court instructed them in strong and vigorous language that they should not be influenced by the assault or by the accompanying demonstration of approval in the courtroom, in arriving at their verdict. There is nothing in the record which shows that the jury failed to respond, as intelligent men, sworn as jurors, to the admonition of the judge. We do not think that upon principle or upon the authorities defendant is entitled to a new trial upon this contention.

For the error in the charge, as appears in this opinion, defendant is entitled to a new trial. It is so ordered.

New trial.

STACY, C. J., concurring in result: There are just three observations which I wish to make in regard to this case:

First, with respect to the alleged confessions of the defendant: Confessions are of two kinds, voluntary and involuntary. Voluntary confessions are admissible in evidence against a defendant; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *Ziang Sung Wan v. United States,* 266 U. S., 1, 69 L. Ed., 131. The voluntariness of a confession is a preliminary question to be determined by the judge in passing upon its competency as evidence. *S. v. Andrews,* 61 N. C., 205. And in deciding the question of its admissibility in evidence, the judge may hear the testimony of witnesses pro and con. *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. If an alleged confession is excluded, its competency cannot arise on appeal; but, if admitted, it may.

Second, as to the charge: When on the trial of a criminal prosecution it is permissible under the bill, as here, to convict the defendant of "a less degree of the same crime" (C. S., 4640), and there is evidence tending to support a milder verdict, the case presents a situation where the defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in this respect is not cured by a verdict convicting the defendant of the highest offense charged in the bill of indictment, for in such event it cannot be known whether the jury would have convicted of a less degree of the same crime if the different views, arising on the evidence, had been correctly presented to them by the trial court. *S. v. Holt,* 192 N. C., 490, 135 S. E., 324; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417; *S. v. Lutterloh,* 188 N. C., 412, 124 S. E., 752; *S. v. Allen,* 186 N. C., 302, 119 S. E., 504; *S. v. Williams,* 185 N. C., 685, 116 S. E., 736; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Kennedy,* 169 N. C., 288, 84 S. E., 515; *S. v. Kendall,* 143 N. C., 659, 57 S. E., 340; *S. v. White,* 138 N. C., 704, 51 S. E., 44; *S. v. Foster,* 130 N. C., 666, 41 S. E., 284; *S. v. Jones,* 79 N. C., 630.

Viewing the record in the light of these decisions and the principle they illustrate, I am convinced that there was error to the prejudice of the defendant in withdrawing from the jury's consideration the question of murder in the second degree.

When on a trial for homicide, a killing with a deadly weapon is admitted or established by the evidence, the law raises two—and only two—presumptions against the slayer: first, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567. The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431. It is provided by C. S., 4200, that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree, punishable by death, and all other kinds of murder shall be deemed murder in the second degree, punishable by imprisonment in the State's prison. *S. v. Banks,* 143 N. C., 652, 57 S. E., 174.

Third, in regard to matters transpiring in the courtroom: Without deciding, as it is unnecessary to do so on the present record, whether the trial court could or should have ordered a mistrial *ex mero motu (S. v. Epps,* 76 N. C., 55), upon the facts stated in the memorandum attached to and made a part of the case on appeal, I am of the opinion that this Court, in the exercise of its appellate jurisdiction and general supervisory power over proceedings in the lower courts, has ample authority to deal with the situation, disclosed by the memorandum filed herein, and to order a new trial, if, in its judgment, the ends of justice require it. *S. v. Wilcox,* 131 N. C., 707, 42 S. E., 536; *S. v. Tilghman,* 33 N. C., 513; *Moore v. Dempsey,* 261 U. S., 86; *Frank v. Mangum,* 237 U. S., 309; *Sheppard v. State,* 141 S. E. (Ga.), 196. Indeed, in capital cases, where human life is involved, it is our rule, *in favorem vitæ,* to examine the whole case to see that no error appears on the face of the record. *S. v. Clyburn, post,* 618; *S. v. Thomas, ante,* 458; *S. v. Taylor,* 194 N. C., 738; *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

The prisoner is now asking that a new trial be awarded on account of the matters and things set out in the memorandum aforementioned and, of course, he could not hereafter plead former jeopardy, should his request be granted. *S. v. Rhodes,* 112 N. C., 857, 17 S. E., 164. I do not think the question is exclusively one of *coram non judice* or loss of jurisdiction on the part of the trial court—such might be the proper inquiry on application for writ of *habeas corpus*—but on appeal to this Court, having, as it does, appellate jurisdiction and "general supervision and control over the proceedings of the inferior courts" (Const., Art. IV, sec. 8), the question is one of due process of law. It is fundamental with us and expressly vouchsafed in the bill of rights that no man shall be "deprived of his life, liberty or property, but by the law of the land." Const., Art. I, sec. 17. The death penalty can be inflicted only as the law in its due administration commands. The concurring opinion of *Associate Justice Brogden,* filed herein, fully covers the law on this subject, as I understand it, and in this regard I entertain views similar to those expressed by him.

ADAMS, J., concurring: Four members of the Court agree in saying that a new trial should be granted for misdirection of the jury. Under these circumstances the assignment of error noted in the record as an exception which was not taken at the trial would probably not be adverted to if it were not for the gravity of the offense related in the memorandum; but since the prisoner has urged this incident as setting forth an invasion of his rights by the alleged abrogation of a law "which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial," it has been thought not inexpedient to give expression to the divergence of opinion not unreasonably produced by this deplorable occurrence.

It may be said first of all that the conduct of the bystanders who perpetrated or encouraged the assault upon the prisoner was utterly indefensible. The Superior Court was in session; the judge was on the bench; the prisoner was on trial in the orderly course of criminal procedure; there was no reason to apprehend a miscarriage of justice. As the evidence was developed friends of the dead child made the first move, no doubt under the natural impulse of uncontrolled passion; but even their violent and overwhelming revulsion of feeling cannot justify or condone the attempt to seize the prisoner and summarily to drag him from the presence of the court.

The crime for which the prisoner was prosecuted was committed 8 December, 1927. A few days afterwards he was put on trial for murder; he was represented by attorneys appointed by the court and was given every opportunity to prepare his defense. During the trial he was assaulted. He had previously made no motion for a continuance, and after the assault he made no motion for a mistrial, and took no exception to anything that was done or said in reference to the disturbance. Even after the verdict was returned he moved neither to set it aside nor to grant a new trial. The case on appeal was settled about two weeks after the term had expired, and the judge of his own volition, and not at the instance of the prisoner, then set out in the record a statement of facts relating to the assault. After this memorandum was made a part of the record the prisoner for the first time made the point that the judge had committed error in not ordering a mistrial of his own motion after the demonstration in the courtroom had taken place.

It will be seen, then, that the initial and fundamental question is this: After his conviction for murder in the first degree, is the prisoner entitled as a legal or constitutional right to a new trial on the ground that the presiding judge did not, of his own motion, order a mistrial on account of the assault and demonstration of bystanders in the courtroom, when the prisoner did not, either during the trial or at any other time, move the court to order a mistrial, or to set aside the verdict, or to grant a new trial, and did not except to anything growing out of the disorder or assign any reason for his failure to make such motions or to take such exceptions?

In considering this question we must not permit ourselves to be borne away by a wave of indignation or influenced by "one pulse of passion," for "What Reason weaves, by Passion is undone." In the light of recognized principles let us consider the undisputed facts. The memorandum is set out in another opinion and need not be repeated here. We may be able to avoid some "chaos of thought" by keeping in mind this statement of the trial judge: "This memorandum is made by the court of its own motion for the information of the Supreme Court, as no exception was taken by the prisoner at the time." This ought to be final. Neither the judge nor the prisoner nor the State treated the exception as entered at any time during the trial. One of the strong points in the argument of the Assistant Attorney-General was the fact that no motion was made in the court below, the denial of which would constitute grounds for alleged error. If this Court, without consent of the prosecution, under the guise of "administering justice" should insert into the record a so-called exception which first occurred to the prisoner's counsel several days after the trial court had adjourned, it would burden the practice with an innovation which, I submit, has no support in precedent or principle. It would introduce the thralldom of an uncertain and variable appellate discretion which would serve as a treacherous and intolerable substitute for the administration of established law.

After a reasonably painstaking investigation I have found no authority, and none has been cited or brought to my attention, which convinces me that this question should be answered in the affirmative. The controlling principle, as I understand it, is this: As the prisoner did not except during the trial, and has not assigned a reason for his failure to do so, the disorder in the courtroom would not entitle him to a new trial as a constitutional right unless in effect it wrought a dissolution of the court or a loss of jurisdiction so as to make the trial a nullity and the proceedings *coram non judice*. *Frank v. Mangum,* 237 U. S., 309, 59 Law Ed., 969. The record discloses neither of these conditions; and a departure from this settled principle would tend to engraft upon our jurisprudence a practice which would be charged with the possibility of the gravest results.

The case of *Moore v. Dempsey,* 261 U. S., 86, 67 Law Ed., 543, sets forth conditions under which the principle just referred to may be applied. In that case five negroes who had been convicted of murder in the first degree were sentenced to death. Omitting more than a bare reference to the circumstances under which the homicide was committed, the arrest by the mob of the defendant's counsel and his hasty departure to save his life, I quote the salient facts as given in the opinion: "Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them, but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that, if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. The committee's own statement was that the reason that the people refrained from mob violence was 'that this committee gave our citizens their solemn promise that the law would be carried out.' According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court, hereafter mentioned, the committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on 27 October, with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and, on the morning of the 29th the indictment was returned. On 3 November the petitioners were brought into court, informed that a certain lawyer was appointed their counsel, and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to any one interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman, or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defense, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour, and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County, and if any prisoner, by any chance, had been acquitted by a jury, he could not have escaped the mob."

These facts give the background of a pretended trial which was indeed a "mask," and "empty form," a travesty, a sheer mockery of justice. The circumstances as recited reveal a manifest subversion of justice because the prisoners were deprived of their defense and hurried to conviction under the pressure of a mob, the lives of the jurymen were endangered if, by any chance the prisoners should be acquitted, and to this pressure the judge himself yielded. Hence said the Court: "If the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State courts failed to correct the wrong—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding the immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

In the case before us neither jury, nor counsel, nor judge was swept to the fatal end by anything approaching an irresistible wave of public passion. It would be extravagant and fanciful to say that the judge abdicated, or surrendered, or succumbed. The prisoner's counsel do not pretend that by fear, or intimidation, or, indeed, by any other means they were prevented from making any motion or entering any exception deemed necessary to the enforcement of the prisoner's rights; and certainly, if the judge's finding of the facts is not to be disregarded the jury was neither terrorized nor coerced into a verdict of guilty. The record is that during the demonstration the jury sat in perfect order and did not appear to be at all disturbed. The disorder was promptly suppressed; six or seven members of a military company came into the courtroom and formed a cordon around the prisoner; and the trial then proceeded in an orderly manner. There was no other disorder or demonstration of violence. In his charge the judge warned the jury in emphatic words not to be influenced by what had occurred; and granting that the effect on their minds cannot be definitely determined, it is not unreasonable to conclude, as the Court said in *Harrison's case,* that the impressive conduct of the judge had far more influence upon the minds of the jury than the impulsive conduct of some of the audience. *S. v. Harrison,* 145 N. C., 408. However this may have been, there was no such dissolution of the court, or surrender of its jurisdiction, or subversion of justice as made it necessary to set aside its subsequent proceedings, or such as reduced them to a nullity. If this conclusion is correct it follows that the judge was not as a matter of law required, of his own motion, to withdraw a juror and order a mistrial. If he had done so in the absence of a motion or an exception by the prisoner the defense of former jeopardy would no doubt have been interposed on the second trial. *S. v. Jefferson,* 66 N. C., 309.

If the jurisdiction of the Superior Court was not lost in the course of the proceedings and the prisoner was not prevented from asserting his rights he cannot be heard to say for the first time, after the case on appeal was settled that the judge should voluntarily have entered exceptions or made orders which had not been requested. Not one of our decisions sustains the prisoner's contention. As said in *S. v. Harrison, supra,* it is but fair to the judge and essential to the administration of justice that the prisoner, unless prevented by menace or fear, should in apt time make his objections known. In *S. v. Wilcox,* 131 N. C., 707, the facts were that for the purpose of breaking the force of counsel's argument a disorderly crowd entered upon a series of demonstrations within and without the courtroom which were of such proportions as to warrant a new trial. No motion was made in the lower court to set aside the verdict, the assigned reason being that the prisoner would at once have met a violent death. In effect this circumstance was regarded as tantamount to an exception taken at the time, for, on appeal to this Court, the Attorney-General agreed to consider the motion as having been entered at the proper time in the court below; and upon this theory the decision was made to rest. It is not necessary to consider a long line of cases in which new trials were granted for misconduct of counsel, jury, witness, or judge upon exceptions noted during the course of the trial.

As no case has been cited from our reports which upholds the prisoner's contention, let us look elsewhere. I refer to the well known case of *Frank v. State* (80 S. E., 1016), in which a new trial was urged on the ground of mob domination and denied, and to the motions for a new trial (83 S. E., 233), and for setting aside the verdict (*ibid.,* 645), merely to observe that the proceedings were shot through with objections taken during the trial. In *Collier v. State,* 42 S. E., 226, the plaintiff in error was on trial for rape, and while the prosecutrix was testifying her husband assaulted or attempted to assault the defendant. An excited crowd in the courthouse moved toward the defendant as if determined to take him away. A new trial was granted, but on the ground that after the disturbance had subsided, and while the trial was in progress the defendant moved the court to declare a mistrial on account of the demonstration, and refusal to grant the motion was assigned as error. So it was in *Vaughan v. State,* 20 S. W., 588; an affidavit that the jury had been improperly influenced was considered by the trial judge in an application for a new trial. In the opinion it is said: "Affidavits are admissible for that purpose, and when considered by the trial court and brought up on the record by bill of exceptions, questions presented by them are brought before us on appeal." For misconduct of "a large crowd of persons in the courtroom" a new trial was given in *Manning v. State,* 39 S. W., 118; but there, also, the appellant's counsel asked for a bill of exceptions to the court's refusal to suppress the demonstration. *Fountain v. State,* 107 At., 554, presents a case of attempted domination by a mob, but the questions reviewed arose upon the refusal of the trial court to grant the defendant's application for a stay of proceedings. In *S. v. Weldon,* 74 S. E., 43, it was made to appear that the prisoner's counsel while going to the courthouse through a dense crowd "heard expressions in regard to lynching," which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoner would be lynched, and under the compulsion of this fear he gave up that most vital right and went into trial without knowledge of the defense. For this reason no error was assigned on the trial, but the record was referred back to the circuit judge for a report of the facts. 71 S. E., 73. The report was made and the appellate court then said: "After much consideration there seems to be no escape from the conclusion that this court cannot now consider the grounds for a new trial set out in the exceptions and affidavits, for the reason that it does not appear that they have ever been passed upon by the circuit court." Owing to the gravity of the crime the appeal was dismissed without prejudice to any right of the defendants to move before the circuit court for a new trial. 71 S. E., 831. After a new trial had been denied by the lower court the appellate court upon exceptions duly presented awarded a new trial. 74 S. E., 43. The decision in substance adheres to the principle stated in *S. v. Wilcox, supra.* And so in other cases an extended review of which under the circumstances is obviously infeasible.

If, as was said in *Frank v. Mangum, supra,* a trial is in fact dominated by a mob which intimidates a jury and coerces a judge into submission so that his control of the trial is lost and there is an actual interference with the course of justice; or as was said in *Moore v. Dempsey, supra,* if judge, jury and counsel are "swept to the fatal end," there is such a want of due process of law as entitles the prejudiced party to a new trial, although no exception was taken during the course of the proceedings.

If jurisdiction is not lost, if the disorder is suppressed by the prompt and vigorous action of the presiding judge, and the trial thereafter proceeds to the end in the usual orderly way, and the complaining party expresses no objection, makes no motion, enters no exception, and fails to assign a reason for not doing so, he is not entitled to have the verdict and judgment set aside as a constitutional right by a method which has aptly been styled "a *post mortem* attempt to get another trial." If, in either case, an exception is taken on the trial, it is the duty of the appellate court to consider it when it is duly set out in the case on appeal as an assignment of error. If an exception is not taken and a satisfactory reason is given for the omission the procedure would probably be similar to that in *S. v. Wilcox, supra,* or *S. v. Weldon, supra.* Whether the circumstances recited in the memorandum would have assured the prisoner a new trial if exception had been taken at the proper time and incorporated in the record is not presented for decision.

There is another phase of the question: It is contended that a new trial may be granted by virtue of Art. IV, sec. 8, of the Constitution. The entire section is as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts."

It will be noted that the first part of the section confers jurisdiction to review decisions upon appeal; but upon the point raised by the prisoner no decision was made. The last clause confers power to issue any remedial writs necessary to give the Court a general supervision and control over the proceedings of the inferior courts. These remedial writs, such as *certiorari* and *supersedeas, mandamus,* the writ of prohibition, and the old writ of error until superseded by the statutory appeal, are usually issued when there is some defect in the record or when some right has apparently been lost which the appellant is entitled to have enforced or when some wrong has been done which ought to be redressed. But here, as I see it, the decisive fact is that no remedial writ has been issued or applied for, and in consequence there is no basis for the "general supervision and control" for which the last clause provides. A close examination of our own decisions will, in my opinion, lend to this conclusion. The appeal presents a bare question of law, to the consideration of which our office as a revising and appellate court is restricted. *McMillan v. Baker,* 85 N. C., 292. Unless one of the remedial writs is issued "this Court best serves its purpose and discharges its legitimate function in our governmental system when it confines itself to its constitutional orbit 'to review any decisions of the courts upon any matters of law or legal inference.' " *Barker v. R. R.,* 137 N. C., 214.

We cannot be too pronounced in the declaration that it is "better to rule than be ruled by the rout"; that the law of the mob shall not supplant the law of the land; and, as suggested in the dissenting opinion in *Frank v. Mangum, supra,* that "lynch law is as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death." But in our solicitude to suppress the mob we must guard against undermining the foundation of principles which constitute the very structure of the law. I concur in the two propositions maintained by *Connor, J.,* that the prisoner is entitled to a new trial for inadvertence in the charge, but not for the disorder which occurred during the trial.

BROGDEN, J., concurring in result: The carefully prepared opinion of the Court, as I interpret the decisions, is correct with respect to the instruction complained of, but in my judgment there is a far graver and more serious aspect of the case which involves not only the constitutional rights of the defendant, but also the more important consideration of the integrity and sanctity of trial courts and their capacity to enforce and apply the law within their own tribunals. The paramount question presented by the record is what constitutes a fair trial as contemplated by law? This question is raised by a memorandum of the trial judge attached to the case on appeal. It is suggested that we have no right to consider this memorandum by virtue of the fact that no exception was taken at the trial to the outbreak in the courtroom. But the memorandum is here. The able and conscientious trial judge evidently thought it ought to be here, and therefore incorporated it as a part of the case on appeal. Assistant Attorney-General Nash, realizing the grave importance of the question involved, has made no motion to strike it from the record. Indeed, approximately one-half of his brief deals with the question. Both parties, therefore, have treated it as an exception. The defendant appealed from the judgment and this in itself is an exception thereto. If the judgment is not supported by a lawful trial, it is void as a matter of law and this Court was created for the express purpose of reviewing matters of law and legal inference. To say that a court of last resort cannot consider a matter of grave public moment, vitally affecting the administration of justice everywhere in the State, because no formal exception was put in the record by a mob-ridden prisoner, when the trial judge and all parties have treated it as such, is to exalt the shadow and debase the substance. This argument seeking to avoid the result of the intolerable tyranny of force takes refuge behind the equally intolerable tyranny of form. Both are repugnant to the genius of a free and justice-loving people. While of course a trial ought not to be weighed in golden scales, yet if the law of the land and the integrity of courts are too insignificant to register, then the law has no use for scales, golden or otherwise.

The memorandum referred to shows the following: "While Deputy Sheriff Kornegay was on the witness stand, and while the courtroom was crowded to its full capacity, the father of the deceased girl, and her uncle, William Tedder, approached the prisoner, and before anyone was aware of his intentions, seized the prisoner by the collar of his coat and attempted to drag him from the bar and into the main body of the courtroom, toward the front door. A number of persons in the audience shouted 'take him, take him!' and a part of the crowd attempted to assist the two Tedders; but the greater part of the audience either remained standing or attempted to get out of the doors. Sheriff Grant rushed into the crowd, seized the prisoner, wrested him away from William Tedder and took him into the jury room, immediately to the rear of the witness stand. He left the prisoner in the jury room with a deputy, returned to the courtroom, and, as the audience was in somewhat of a turmoil, fired his pistol at the ceiling in order to quell the tumult. The court ordered the sheriff and his deputies to stand by and prevent any further demonstration, and stated to the audience that any further attempt upon the life of the prisoner would be met by force. The local military company had been directed by the Adjutant General to hold itself in readiness in case of an emergency, and it had been agreed that the company should assemble in the armory and be in full uniform by 9:30 o'clock on Sunday morning when the court assembled to continue the trial. The signal for help was to ring the courthouse bell, which was done; and in a few minutes soldiers came into the courtroom, some six or seven of them, and formed a cordon about the prisoner during the remainder of the trial. There was no further demonstration and the trial proceeded in an orderly manner. During the foregoing demonstration the jury sat in perfect order and did not appear to be at all disturbed; and the court charged them, as appears from the case, not to be influenced by what had occurred. This memorandum is made by the court of its own motion, for the information of the Supreme Court, as no exception was taken by the prisoner at the time. The foregoing is settled as case on appeal in the case of State v. Larry Newsome, counsel having disagreed. This 2 January, 1928."

In *Robinson v. State,* 65 S. E., 792, the Georgia Court defined a fair trial as follows: "A fair trial means one in which there shall be no bias or prejudice for or against the accused, and in which not only the witness chair and the jury box, but the courthouse also shall be purged of every suspicious circumstance tending to take from the accused any of the rights given to him by the law." Again in the famous *Frank case,* 237 U. S., 309, 59 L. Ed., 983, the Supreme Court of the United States said: "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court a departure from due process of law in the proper sense of that term." To the same effect is *Massey v. State,* 20 S. W., p. 762. The Texas Court said: "In all civilized countries the law has always shown the most sacred regard for human life, and judicial tribunals, in the administration of the criminal law, have always deemed it proper to adhere with great strictness to established rules, where life and liberty are concerned. If courts could feel themselves at liberty to depart from principle or established rules in order to hasten the punishment of even great offenders, such departures might result in the destruction of those safeguards which, in accordance with the genius of all free governments, have been provided for the life and liberty of men."

Upon the record and upon the principles of law applicable, the complete question before us is: "Can a prisoner, charged with a capital felony, and while testimony is being offered against him in open court, be assaulted, man-handled and dragged about the courtroom in the presence of the jury, and yet secure such a fair trial as under the Constitution and laws of the State will support a judgment condemning him to death?"

At the outset of the discussion it is perhaps advisable to consider the trend of judicial thought upon this question. In this State certain aspects of the question involved have been discussed in *S. v. Wilcox,* 131 N. C., 707; *S. v. Harrison,* 145 N. C., 408; *S. v. Vann,* 162 N. C., 534; *S. v. Caldwell,* 181 N. C., 519. In the *Caldwell case* a mob in Wayne County attacked the courthouse and jail at night and after the adjournment of court, presumably in an effort to lynch the prisoners. The attack was repelled. The jury was at a hotel two blocks away, and there is nothing in the case, as reported, to indicate that the jury knew of the attack. The next morning the trial proceeded regularly and in proper order.

Upon such a state of facts the verdict was upheld.

In *S. v. Vann* a ripple of laughter passed over the courtroom and there was some slight applause consisting of one or two handclaps by ladies, over a tilt between the solicitor and counsel for the defendant. The court promptly repressed the disturbance and the judgment was upheld. In *S. v. Harrison* there was applause in the courtroom evoked by a tilt between counsel. The court imprisoned one offender for his unseemly conduct, and this Court observed upon the appeal that "summary punishment upon an offender had far more influence upon the minds of the jury than the impulsive conduct of some of the audience." In *S. v. Wilcox,* while counsel for the defendant was addressing the jury, about one hundred people, as if by concert, left the courtroom. Soon thereafter a fire alarm was given near the courthouse, which caused a number of other persons to leave the courtroom. As in the case at bar, there was no motion made by the prisoner to set aside the verdict in consequence of such conduct, and the court did not find that the jury was influenced thereby. This Court observed: "In such a case as this, it was not indispensable that a finding by his Honor that the jury had been influenced by the conduct of the offenders should have been made." In discussing the merits of the case the Court said: "The disorderly proceedings assumed such proportions as to warrant this Court in declaring that the trial was not conducted according to the law of the land. The propriety of our ruling is strengthened by the circumstances that contempt proceedings were not commenced against those offending, and that no motion was made to set the verdict aside and for a new trial after such unheard of demonstration. . . . The prisoner must not only be tried according to the forms of law, these forms being included in the expression 'the law of the land,' but his trial must be unattended by such influences and such demonstrations of lawlessness and intimidation as were present on the former occasion. The courts must stand for civilization, for the proper administration of the law in orderly proceedings. There must be a new trial of this case." *Clark, J.,* concurring in the opinion of the Court said: "The administration of justice must not only be fair and unbiased, but it must be above any just suspicion of any influence, save that credit which the jury shall give to the evidence before them. It is of vital importance to the public welfare that the decisions of courts of justice shall command respect, but this will be impossible if there is ground to believe that extraneous influence of any kind whatever has been brought to bear."

The wholesome and salutary principles announced in the *Wilcox case* have been recognized with practical uniformity by Appellate Courts of other jurisdictions. In *Sanders v. The State,* 85 Ind., 318, the defendant was charged with killing his wife. The killing had aroused intense feeling, and when the case came to trial threats of lynching were made by a mob. Counsel for the prisoner prepared an affidavit for continuance, but feared to present it lest the mob would seize and hang his client. The prisoner first entered a plea of not guilty, but by reason of the presence of the mob, the plea was withdrawn and a plea of guilty entered. A verdict of guilty was returned by the jury. The defendant was sentenced to life imprisonment and was immediately hurried to the penitentiary. Thereafter the defendant asked that the plea of guilty be vacated and that he be awarded a trial according to law. The Court vacated the judgment and permitted the defendant to withdraw the plea of guilty. The Court said: "All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence." In *Collier v. State*, 42 S. E., 226, the defendant was tried and convicted for rape. While the prosecutrix was upon the witness stand she grew excited and turned to the defendant, saying, "You know you are guilty." Thereupon a large portion of the audience became very much excited and came pouring over the benches in an excited manner to where the defendant was. The judge commanded the crowd to sit down. After the jury had retired to the jury room to consider their verdict there was a crowd of fifty or seventy-five people in and around the courthouse and in the yard of the courthouse who were acting in a very boisterous manner. The Supreme Court of Georgia said: "It would be mere idle talk to say that the jurors did not understand that the demonstration was against the prisoner on trial. It is true that each of the jurors testified that, while they heard the noises, they could not understand what was said. . . . But the question is not whether, in fact, the jurors were influenced by these demonstrations, but were the demonstrations calculated to influence the jurors in their action. . . . Tested by this rule, it is apparent that the defendant did not have a fair and impartial trial, which the law guarantees to him, and to which he is entitled be he guilty or innocent. The heinousness of the crime with which he was charged must not and cannot be allowed to affect the manner of his trial; and only by a fair and legal trial can his guilt be so established as to make him subject to the punishment which the law visits on offenders in such a case." So in *Woolfolk v. State,* 8 S. E., 724, during the progress of the trial, someone in the audience cried out, "Hang him! Hang him!" All the jurors made affidavits that these things had no influence upon their minds. The Supreme Court of Georgia said: "Can any of us know how far our minds are influenced by applause or excitement of a crowd which surrounds us? Can any of us say, even in this Court, that this or that piece of testimony, or this or that argument of counsel, has not influenced our minds? Can any of us say that, on the trial of one of the most heinous crimes ever committed in this State or any other, the applause of the crowd, the fierce cries of 'Hang him! Hang him!' from members of the crowd, followed later on by a repetition of the same cry, would have no influence upon our minds? Our minds are so constituted that it is impossible to say what impression scenes of this kind would make upon us, unless we had determined beforehand that the prisoner was guilty or innocent." Again in *S. v. Weldon,* 91 S. C., 29, 74 S. E., 43, the second head-note is as follows: "Where a large crowd of people intensely hostile to the accused crowded the courthouse during their trial for murder, and filled the space within the bar immediately around the judge, the jury, and the witnesses, so that counsel for accused did not see the jury, until he addressed them, because of the crowd, and the crowd's intrusion into that part of the courtroom was calculated to overawe the jury, and it was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury. . . . The defendants, upon conviction, were entitled to a new trial." In that case the trial judge, in making report of the trial to the Appellate Court stated: "It was simply a crowd and quite a crowd for Florence courtroom, and that is all that can be said about it, except that it was the best behaved crowd I ever saw." The Supreme Court of South Carolina, however, notwithstanding, said: "We are unable to assent to the opinion of the presiding judge that such a state of affairs did not interfere with the orderly conduct of the business of the Court or with the rights of the accused. . . . By our Constitution, the people have set the law above themselves, except as they choose to change it by the methods which they themselves have ordained; and they have laid upon the courts the duty of enforcing their promise that the weak, as well as the strong, shall be condemned only after a fair trial according to law before an impartial jury. In the faithful performance of their promise by the people, and in the discharge of their duty by the courts, is involved, not only the public honor, but public safety, prosperity, and happiness; for in the long run neither individual nor community success is possible, unless men feel that they will not lose life nor liberty nor property without a fair and impartial trial under the law of the land."

In *Fountain v. State,* 107 Atlantic, 554, 5 A. L. R., 908, it appeared that when court adjourned at ten o'clock at night on the first day of the trial a large crowd of about two thousand persons were assembled on the courthouse ground upon which the county jail was located; that while the prisoner was being taken from the courthouse to the jail through the crowd personal violence was inflicted upon him in an effort to take him from the custody of officers and lynch him. In the confusion the defendant made his escape. The trial was suspended and a reward of $5,000 for his recapture was offered by the court. Within two days he was recaptured and the trial proceeded, and the defendant was convicted of rape. The Supreme Court of Maryland said: "It is natural that popular wrath and indignation should be aroused by such an atrocious offense as this record discloses. But the identification and punishment of the criminal must be left to the careful and regular processes of the law, however deep and just may be the public sense of horror at the crime. The law does not tolerate any interference with the right of the humblest individual to be accorded equal and exact justice, and, when charged with crime, to have the question of his guilt or innocence fairly and impartially determined. It is of the highest concern to the people and courts alike that this vital and sacred right shall be preserved inviolate. Judgment reversed, and new trial awarded." The Court of Criminal Appeals of Texas, considering the question in *Massey v. State,* 20 S. W., 758, said: "Appellant has not had a fair and impartial trial. He has not had a legal trial. But it may be urged that he is guilty, beyond all question, and therefore the judgment should be affirmed. Not so. The accused must be tried and convicted legally, and though he be a negro, he must be tried in precisely the same manner as if he were a white man. In the case of *Shylock v. Antonio,* the merchant of Venice, Bassanio, a great friend of Antonio, urged Portia, the judge, to "wrest once the law to your authority. To do a great right, do a little wrong, and curb this cruel devil of his will." Portia's answer was law—the correct principle. She replied: "It must not be. There is no power in Venice can alter a decree established. 'Twill be recorded for a precedent, and many an error, by the same example, will rush into the State. It cannot be."

In *Faulkner v. State,* 189 S. W., 1077, the defendant was indicted and convicted of rape. When the prosecutrix was testifying she pointed out the defendant. Immediately a brother of the prosecutrix who was sitting near the bar, arose with the exclamation "Lynch the son of a bitch, he is mine," and came walking toward the defendant. A deputy sheriff took him before he got to the defendant. The sheriff partly drew his pistol, commanding the brother of the prosecutrix to stop, and he was taken from the courtroom. The presiding judge said nothing and the offending party was neither fined nor otherwise reprimanded for his conduct. While the jury was deliberating there was a large crowd in the courtroom. The judge ascertained that the verdict of the jury would be life imprisonment and was afraid to bring the jury out of the jury room until the crowd dispersed, which was sometime after midnight. The court of criminal appeals of Texas awarded a new trial, the court observing: "It will be an unfortunate day in Texas and its jurisprudence and to the life-loving citizenship, if mob spirit can pervade the courtroom and influence the jury in their verdict against the testimony, or even where there might be testimony sufficient to support the conviction, that would influence or tend to influence the jury against defendant on such trial."

The cases referred to are typical of a great multitude of decisions upon various aspects of the subject. The writer has found no case in which a prisoner has actually been assaulted by a mob in the presence of the jury and during the progress of taking testimony. The case at bar therefore is without a parallel or a peer in the judicial history of the question involved so far as I have discovered. Indeed this Court has held that unnecessary abuse of a defendant in the argument of his case may warrant a new trial. The famous "upas tree case" is a shining example. The incident occurred in the case of *Coble v. Coble,* 79 N. C., 589, in which the attorney for the plaintiff compared the defendant to "the upas tree, shedding pestilence and corruption all around him." The contention was that this language could not have influenced the jury. This Court said: "This is the excuse. To use it seems an aggravation of the offense, for it admits that there was not and could not have been a single ground for the derogatory assault upon the defendant. It was therefore unprovoked and wanton, and could have been resorted to for the single purpose only of prejudicing his cause before the jury—the verdict must be carried by denouncing the man—and it was carried." Again in *S. v. Tucker,* 190 N. C., 708, the prisoners were referred to as follows: "Gentlemen of the jury, look at the defendants, they look like professional bootleggers, their looks are enough to convict them." The Court awarded a new trial, although the defendants were charged not with a capital felony, but for a violation of the prohibition law. Certainly, if a new trial is awarded under the law for an assault with words in the trial of a misdemeanor, it would appear that the actual assaulting and manhandling of a prisoner in the presence of a jury during the progress of his trial for a capital felony would be of equal dignity with a violation of the liquor law or of a civil action when perhaps an insignificant amount of property was involved.

I am not inadvertent to the fact that such a crime as is disclosed by the present record excites in a normal man a feeling of outrage as strong as death and as cruel as the grave; but society from motives of sheer preservation has built the rock of law to stand as an unshaken and everlasting barrier to roll back, in vain, the lashing waves of popular clamor and revenge. Under the law as written the life of the defendant can be taken by the State, if found guilty after a fair and impartial trial, but when the State takes life it ought to take it as befits the peace and dignity of a great State, and this can only be done when the constitutional safeguards set by our fathers have been observed and applied in the trial of the accused. These safeguards are not designed solely for the benefit of a criminal, but for the preservation and integrity of society itself. Much is being said and written about law enforcement. But if the law cannot be enforced within the very tribunals of justice, so as to preserve inviolate the person of litigants from frenzied force, and yet uphold verdicts rendered after such unlawful invasion of the sanctity of judicial proceedings, well may the court criers throughout the State in opening and adjourning the sittings, shout in thunder tones, "God save the State and this Honorable Court."

I think, when the defendant was seized, assaulted, man-handled and dragged about the courtroom, in the presence of the jury and during the introduction of testimony against him, that then and there the trial ended and the subsequent proceedings were a nullity.

CLARKSON, J., dissenting: The administration of the criminal law is a serious undertaking; it involves the wellbeing of society. The greatest and the humblest are entitled to a fair and impartial trial. The law intends that the guilty be punished and that technicalities and refinements should not defeat justice. A trial should be on its merits.

The Constitution of North Carolina on this subject is as follows: Article I, sec. 11. "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

Section 12. "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment."

Section 13. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

In the humanity of the law it is written that the "jury of good and lawful men" cannot convict one charged with crime unless the culprit has been proven guilty of the offense charged beyond a reasonable doubt. There is no place in orderly government for mob violence. The danger of punishing the innocent is too well known—the leading case is Pilate yielding to the mob. It is a matter of common knowledge, and to the everlasting credit of this commonwealth, that the strong arms of the executives for the last seven years have reached out and protected every one, no matter how humble and how revolting and heinous was the alleged crime, and has seen to it that the law was administered through the courts. During that time not a single lynching has taken place. There has been no super-government in this commonwealth, so courts should be slow to grant new trials on technical grounds with no merit and where no injustice has been done.

The present record, as I construe it, discloses that on the trial of defendant every legal right given to him by the Constitution was complied with. This Court, under Article IV, sec. 8, has "no jurisdiction to review, upon appeal, any decision of the courts below," except "upon any matter of law or legal inference." The power "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts" does not apply to a case like the present one.

As to what occurred in the courtroom during the progress of the trial, no exception or assignment of error was made by defendant. Nor did defendant during the progress of the trial request a mistrial for what took place and for failure to except and assign error. Nor did defendant at the conclusion ask that the verdict be set aside or for a new trial. The defendant is not now entitled in this Court to be heard that he is prejudiced by the occurrence. Granting that it was unseemly and out of the ordinary, defendant did not except and assign error, but allowed the trial to proceed. The court below charged the jury pointedly that what had occurred in the courtroom should or ought not to influence them in the slightest degree, and they should be governed only by the evidence of the witnesses on the stand unbiased by anything that had occurred or anything they had observed. The presumption is that the jury was composed of men "of good moral character and of sufficient intelligence." Their duty was to render a verdict upon the evidence. This Court cannot *ex mero motu* step in and grant a new trial after the charge of the court on the aspect of the occurrence for that which defendant himself did at the time except to and assign error as prejudicial. The Constitution, as I construe it, gives this Court no such supervisory power over the Superior Court—a court created and vested by the Constitution with power alone to try cases like the present.

I will now confine myself to the only material exception and assignment of error as to the charge of the court below, upon which a majority of this Court grants a new trial.

The court below charged the jury as follows: *"In this case I do not see and cannot arrive at any conclusion that would lead me to leave with you the question of his guilt upon a charge of second degree murder or manslaughter; I therefore charge you that you can return but one of two verdicts in this case, either murder in the first degree or not guilty."*

I cannot construe the evidence in any other light than the careful and learned judge who tried the action in the court below did; that there was no evidence of murder in the second degree or manslaughter. It has always been recognized in this jurisdiction that this Court in its discretion can say what evidence is sufficient—more than a scintilla—in civil or criminal actions to be submitted to the jury. Out of this well-settled principle the procedure in civil actions is regulated by C. S., 567, known as the *Hinsdale Act,* in criminal actions, C. S., 4643, known as the *Mason Act,* spoken of as demurrer to the evidence. This power or discretion in the Superior and Supreme Appellate Court, should be exercised with care and caution. Recently the majority of this Court, after a most careful consideration, said in *S. v. Montague, ante,* p. 20, that the circumstantial evidence in that case was not sufficient to have been submitted to a jury. Whether there be any evidence is a question for the judge; whether sufficient evidence for the jury. *Wittkowsky v. Wasson,* 71 N. C., 457; *Ridge v. R. R.,* 167 N. C., pp. 510-517.

The principle being established, what is the law? C. S., 4200, is as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture *or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any* arson, *rape,* robbery, burglary or other felony, *shall be deemed to be murder in the first degree and shall be punished with death.* All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State prison." (Italics mine.)

C. S., 564, is as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, *shall give an opinion whether a fact is fully or sufficiently proven,* that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." (Italics mine.)

Under C. S., 564, *supra,* it is well settled for nearly a century and a third that where there is sufficient evidence to be submitted to the jury, that a judge cannot express an opinion whether a fact is fully or sufficiently proven. This is the sole province of the jury, but whether there is or is not sufficient evidence is one solely for the court, and has been for all time exercised by the trial court and upon proper exception and assignment of error considered in this Court.

C. S., 4642, is as follows: "Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." This section has been construed merely to mean that when the jury renders the verdict, the degree must be stated.

In *S. v. Ross,* 193 N. C., at p. 26, construing this section, it is said: "Again, in the record, as first certified to this Court, it is stated that the jury returned the following verdict: 'That the said W. L. Ross is guilty of the felony and murder in manner and form as charged in the bill of indictment.' It was said in *S. v. Truesdale,* 125 N. C., 696, that, since the act of 1893, now C. S., 4200 and 4642, dividing murder into two degrees, first and second, a verdict which fails specifically to find the prisoner guilty of murder in the first degree, will not support a death sentence. See, also, *S. v. Murphy,* 157 N. C., 614."

In *S. v. Spivey,* 151 N. C., at p. 686, it is said: "Under the construction of the statute by this Court in *S. v. Gilchrist,* 113 N. C., 673, and *S. v. Norwood,* 115 N. C., 789, the third section (now section 3271, Revisal), (C. S., 4642), does not give jurors a discretion, when rendering their verdict, to determine of what degree of murder a prisoner is guilty. They must render a verdict according to the evidence; and, believing a prisoner guilty, beyond a reasonable doubt, of murder in the first degree, it is their duty so to find, however much inclined to show mercy by rendering a verdict of a lesser offense. Their obligation in that respect has not been changed by the statute, and it is the same that it was upon the trial for homicide before its enactment, and the question was whether the prisoner was guilty of murder or manslaughter." *S. v. Covington,* 117 N. C., 834.

In *S. v. Wiseman,* 178 N. C., at p. 795, it is said: "It is one of those cases in which there was no doubt as to the manner of the killing, and the court might well have charged the jury, though it did not do so, that 'the prisoner was guilty of murder in the first degree or nothing.' This would have been strictly in accordance with the testimony and numerous precedents. *S. v. McKinney,* 111 N. C., 684; *S. v. Cox,* 110 N. C., 503; *S. v. Byers,* 100 N. C., 512; *S. v. Jones,* 93 N. C., 611, and numerous others."

In *S. v. Spivey, supra,* at p. 686, continuing the quotation from that opinion in the main opinion, it says more, as follows: *"It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder. This does not mean any fanciful inference tending to prove one of the lower grades of murder; but, considering the evidence 'in the best light' for the prisoner, can the inference of murder in the second degree or manslaughter be fairly deduced therefrom."* (Italics mine.)

Weighed by the above decision, I think that the inference in the present case as to a lower grade of murder, in the language of the *Spivey case,* fanciful. The defendant introduced no evidence. I think the evidence for the State found to be true beyond a reasonable doubt by the jury showed (1) a wilful, deliberate and premeditated killing; (2) committed in the attempt to perpetrate rape.

What is the evidence, carefully taken from the record? All the witnesses, including the physician who examined defendant, testified that in their opinion defendant knew right from wrong at the time and had sufficient intelligence to know right from wrong. *S. v. Potts,* 100 N. C., 457; *S. v. Journegan,* 185 N. C., 700. Alexander Tedder, a farmer, lived near Fremont, in Wayne County. He was the father of eight children. The oldest, Beulah Tedder, 14 years of age, weighed about

115 pounds; about dark, 6 o'clock, on the afternoon of 8 December, the father sent her with Cora Reid to the latter's home, some 2,200 feet away, to get some home-made syrup. The two in going the customary way passed defendant's home, about 1,200 feet from the Tedder home. The defendant's home was 900 feet from the Reid home. Along the route was a peach orchard and a pine thicket. Beulah had been gone about three-quarters of an hour, and looking out for his daughter's return, and seeing an object in the path about 35 or 40 yards from his house, the father went to it and found his daughter lying there dead. There was considerable blood at the place she was lying. She was flat on her back and her face slightly to one side, one of her legs was up under her and her dress turned backward toward her shoulders. There were two cuts on her left cheek. Her neck was cut all the way around the front. Her throat was cut. There were several cuts on her left hand, all across the fingers, one across the inside of her hand; some on the upper part of her arm, and in her right hand the flesh was torn entirely away from the bone and hanging down across her fingers. The little girl had not been ravished. Immediately steps were taken to find the murderer. The sheriff of the county and others started an investigation. The facts disclosed that Beulah and Cora Reid, in going to the latter's home for the syrup, passed defendant's home. Beulah, after remaining at Cora Reid's home about 5 minutes, left with a jar of home-made syrup, going back toward her home in the direction of defendant's home. About 25 or 30 minutes after Beulah left Cora Reid's home, defendant came there and remained 2 or 3 minutes and left. He had on a dark suit and a pair of overalls. The pathway for Beulah to go and return is along the edge of the woods in which are growing many small pines and bushes. In making her return home, in the woods was found where the blood started. It looked like a man and woman had been struggling on the ground; prints of their heels could be seen. The prints of people's toes and elbows were apparent at the scene of the struggle. The struggle appeared to be over an area of some 10 or 12 feet, and was about 10 steps from the path entering the roadway from defendant's house, some 125 yards up the path. At the scene of the struggle the bark was broken on a tree which looked as if the fingers had grabbed the tree to hold on. At the scene of the struggle the half-gallon of syrup was found and the little girl's bonnet. Boot tracks, and those apparently made by a girl, were observed. From this first struggle to where Beulah was found dead some blood along the pathway for a distance of 125 to 140 yards was found. Along the way from the first struggle were found signs of a girl's tracks as well as boot tracks following her to a point about 30 steps from the road leading toward the girl's home, and there it looked as if the man broke and ran across the field and the girl pro-

ceeded toward her home. The person in the boots would apparently catch up with the girl and another struggle would ensue. This was along a route 125 to 140 yards from the starting point. Going toward the Reid home, down the path, was found from where the little girl was lying in the little path, blood on down to the edge of the road; it dripped along to the peach orchard. In the path that cut the corner off the peach orchard was found where there had been a struggle, and there was found a puddle of blood; a little further on, going in the direction of the woods, was found where there had been another struggle, and in the woods, the path going in, was found that there had been a struggle in the woods, and there the last blood was found; that's where the blood started in the woods, where the first struggle commenced, as heretofore set forth.

From ascertaining the above facts, the officers went to defendant's home, followed the running tracks, and a knife was found under the edge of the house. This knife was in the shape of a woman's leg, and had a long, keen blade; it was very sharp and bloody. Upon searching the house a pair of boots and overalls, blood apparently fresh on both, were found. The overalls were hanging in a closet. The defendant was arrested and examined, and there was found a cut on his hand, the wound apparently a fresh one, and bleeding, and blood on his pocket. The defendant said he had some boots, and that he had been rabbit hunting that day, and had gotten blood on his boots off of the rabbit, and the overalls which he had left at home had been worn by him while dressing the rabbit, and if there was blood on them that it must have come from the rabbit. The officers went back to the scene of the struggle and fitted the boots in the tracks and found that the boots fitted exactly into the tracks, and fitted the running tracks. This test was made at several places, and in each place the boots fitted into the tracks.

Frank Aycock, on the morning after the murder, made an examination. He testified "That the path from the Tedder house to the road is about 200 feet, and that 110 feet from the house on the path he found a large pool of blood, which he thought was the place they found the child. One hundred and eighty-five feet further along the path, away from the home, he found another large pool of blood. That near the turn of the cartway leading to the Tedder home is a peach orchard, and that near the peach orchard he found the second pool referred to, and there was a little blood on the path between the two pools of blood referred to; that further away from the house, on the cartway is a patch of woods, and in the patch of woods, and about 15 feet off the cartway, was another pool of blood, and in the pine thicket there was a small amount of blood on the leaves. He also saw a bonnet near this place."

The confession of defendant to Dr. W. C. Linville, admitted in evidence, was as follows: "I asked him what caused him to do this, and he said 'I don't know'; and I asked him if he cut the girl immediately after he came up with her, and he said he did not, but said he seized her around the waist, and she fought him off, and ran from him, and after he caught up with her he cut her. That was about all he said. He did say he cut her because she said she was going to tell her father."

First, all the evidence was to the effect that it was a wilful, deliberate and premeditated killing.

In *S. v. Daniel,* 139 N. C., at p. 554, quoting from Kerr on Homicide, sec. 72, it is said: " 'The celerity of mental action is such that the formation of a definite purpose may not occupy more than a moment of time, hence the important question in such a case is to determine whether the external facts and circumstances, at the time of the killing, as well as before and after that time, having connection with, or relation to it, furnished satisfactory evidence of the existence of a calm and deliberate mind on the part of the accused at the time the act was committed. If they show a formed design to take the life of the person slain, or to do him serious bodily harm, which in its necessary or probable consequence may end in his death, he is guilty of murder in the highest degree.' "

"The formation of a definite purpose may not occupy more than a moment of time." In *S. v. Benson,* 183 N. C., p. 795, it is said: "Premeditation means 'thought of beforehand' for some length of time, however short." *S. v. Walker,* 173 N. C., 780; *S. v. Holdsclaw,* 180 N. C., 731. "If the circumstances of the killing show a formal design to take life of deceased, the crime is murder in the first degree. *S. v. Walker, supra; S. v. Cain,* 178 N. C., 724; Michie, N. C. Code, 1927, at p. 1312, sec. 4200.

Second, all the evidence was to the effect that the killing was committed in the attempt to perpetrate rape. Under the statute, this is murder in the first degree. The charge complained of in the main opinion giving a new trial is based on defendant's confession, but that confession, analyzed, although in the latter part defendant says he cut her because she said she was going to tell her father, but the confession further says she fought him off and ran from him, and after he caught up with her he cut her. This, coupled with the other evidence, shows from beginning to end that it was in an attempt to perpetrate rape in the very teeth of the statute, and was murder in the first degree. The killing was an incident to the attempt. It is contended in the main opinion that the confession indicated premeditation and deliberation, and this was a fact for the jury to determine and not for the court; that if they found he killed her beyond a reasonable doubt, with premeditation and deliberation, he would be guilty of murder in the first degree, but if they should not so find, he would be guilty of murder in the second degree. I cannot so construe the confession. To my mind such a construction is attenuated and fanciful, and I think there was no evidence of second degree murder or manslaughter sufficient to be submitted to a jury. It was a continuous assault in an attempt to commit rape, which by the statute is *per se* murder in the first degree. Even if the charge complained of was error, on all the facts and circumstances on the record, it was harmless.

In the *Spivey case* the record discloses a murder by lying in wait or an attempt to commit arson, which by the statute is *per se* murder in the first degree. In such case, and in the present case *rape,* set forth in the statute, the State is not required to prove premeditation or deliberation. The manner of doing the act necessarily involves premeditation and deliberation. I have cited the law in regard to wilful, deliberate and premeditated killing, for on that aspect the confession of defendant is the sole ground on which the majority of this Court grants a new trial. The question of premeditation and deliberation, from defendant's confession, I do not think arises. It is not sufficient to base any inference of murder in the second degree or manslaughter. So, conceding that the question of premeditation and deliberation is one for the jury, it is only so when there is any, or sufficient, evidence to present it.

Defendant's purpose, from all the evidence, was rape. He confessed to killing the little girl; he said that he seized her around the waist; she fought him off and ran from him; he caught up with her and cut her because she said she was going to tell her father. This statement, taken "in the best light" for defendant, I can deduce therefrom, like the learned judge in the court below, no inference of murder in the second degree or manslaughter. Then again, the identity of the defendant being established by his confession, as well as circumstantial evidence, all leads to one conclusion—a continuous assault, and that he killed in an attempt to commit a capital offense—rape.

Succinctly the facts: The details perhaps are unequalled in the annals of the State; where a white child, 14 years of age, made so heroic a fight with defendant, a negro man, for her virtue and honor, and won in the fierce battle. This little girl, about dusk, a December evening, was sent by her father to go with a woman living less than a half-mile away to get some home-made syrup. On the way the little girl passed defendant's home. He saw her, and the lust of the jungle overpowered him. He armed himself with a sharp knife that had a long, keen blade. He lay in wait for her in the woods, watching for her on her return home. He sprang at her like a panther for the prey, and seized her around the waist. The struggle of the child and man was terrific; they fought over an area of 10 or 12 feet. The struggle on the ground showed prints of their heels, toes, knees and elbows; the bark was broken on a tree, the appearance of fingers grabbing the tree to hold on, blood was left from this fierce struggle, and the half-gallon of syrup and the little girl's bonnet lay there. The little girl escaped, blood dripping along the way as she fled, and the man in boots pursued her, and another struggle and a puddle of blood, and then again she escapes, and the man in boots pursues her and a struggle again, then the boot tracks show where the defendant broke and ran, and the girl proceeds towards her home, but with her throat and neck cut all around and her arms and fingers cut up, and she falls in the home path and was there found by her father. In this bloody condition dead, but pure and white as the driven snow. This was the end of little Beulah Tedder and her heroic struggle. The identity of defendant was not disputed. He committed the foul deed in an attempt to ravish her, and the trail of blood and struggle from start to finish between defendant and the little girl was trailed some 125 or 140 yards. When his lust was foiled, defendant, with the sharp knife he carried with him, cut her throat. It was a continuous assault in an attempt to commit rape, and no evidence of second degree murder or manslaughter. Refinements and technicalities should be brushed aside and trials should be had on their merits. The trial in the lower court, under the facts and circumstances of this case, should not be weighed in "gold scales," but justice done to the dead as well as the living.

There is no place in this civilization for lynch law, but orderly government must prevail, founded on common-sense and conditions that surround the actors. For the reasons given, I most earnestly dissent to awarding a new trial. I can see no precedent effected by sustaining the verdict and judgment of the court below, but only an incentive that orderly government shall be supreme and the guilty punished.

The courageous judge in the court below was firm to see that

"When passion blows the breeze,
Let reason guide the helm."

W. E. THOMAS v. PIEDMONT REALTY AND DEVELOPMENT COMPANY ET AL.

(Filed 9 May, 1928.)

1. **Principal and Agent—Compensation of Agent for Services Rendered—Quasi Contracts.**

   Where, at the request of the owner, a real estate agent begins negotiations for the lease of his building, which is finally successfully concluded by the concurring efforts of them both, the agent is entitled to a reasonable compensation for the value of the services he has rendered.

2. Same—Evidence of Reasonable Value.

In relation to the question of the value of the services rendered, under the facts of this case; it is *Held*, competent, in the absence of a special contract fixing the amount, to show in evidence a schedule of commissions of the board of real estate men in that locality, with evidence of its reasonableness, when the jury's consideration thereof is properly confined to the question of reasonable value. *Trust Co. v. Goode*, 164 N. C., 20, cited and distinguished.

3. Interest—Time and Computation—Time from which Interest on Judgment for Services Rendered Runs.

When a real estate man is entitled to recover a reasonable amount for his services rendered in securing a tenant for a building, the sum fixed by the verdict will, as a matter of law, draw interest from the time the same was due and payable. C. S., 2309.

APPEAL by defendant from *McRae, Special Judge,* at September Term, 1927, of MECKLENBURG. No error.

Action to recover of defendant reasonable compensation for services rendered by plaintiff, as a real estate broker, in procuring a lease for certain real estate owned by defendant.

The issue submitted to the jury was answered as follows: "What amount, if any, is the plaintiff entitled to recover of the Piedmont Realty and Development Company (now the Cutter Realty Company)? Answer: $11,850.00."

From the judgment on the verdict that plaintiff recover of defendant the sum of eleven thousand eight hundred and fifty dollars ($11,850), with interest from 5 June, 1925, defendant appealed to the Supreme Court.

Cansler & Cansler and John M. Robinson for plaintiff.
Pharr, Bell & Pharr and Thomas C. Guthrie for defendant.

CONNOR, J. On or about 5 June, 1925, and for some years prior thereto, defendant was the owner of certain real estate situate on North Tryon Street, in the city of Charlotte, N. C., at Sixth Street. This real estate, together with a building to be erected thereon, and to be used by the lessee as a theatre, was leased by defendant for a term of years, at annual rentals, aggregating for the term the sum of $790,000.00. The lease was the result of negotiations between the parties which had extended through several months. The lessee, a corporation, is a nonresident of this State; it had been interested in the lease by the plaintiff, who is engaged in business in the city of Charlotte, as a real estate broker. The negotiations which resulted in the lease were conducted partly by the plaintiff, as a broker, and partly by the parties themselves.

Two questions of fact are involved in the issue submitted by the court to the jury. First: Is defendant liable to plaintiff for services rendered by him in procuring the lease, as alleged in the complaint? Second: If so, what sum is a reasonable compensation for such services? Both these questions, as appears by the verdict, were answered by the jury in accordance with the contentions of plaintiff. The verdict is supported by the evidence offered at the trial, and admitted by the court. The judgment must, therefore, be affirmed, unless there was error, as contended by defendant, upon its appeal to this Court, in the admission of evidence, or with respect to instructions by the court to the jury, or in the judgment upon the verdict as signed by the judge presiding.

There was evidence in support of the contention of plaintiff that he opened and conducted, at least in part, the negotiations which resulted in the lease. Plaintiff, as a witness in his own behalf, so testified. J. H. Cutter, president of defendant company, as a witness in its behalf, testified that when he learned that the negotiations, which plaintiff had been conducting for a lease of the Burwell-Harris property, as a site for a theatre, had been unsuccessful, he sent for plaintiff, and requested him to ascertain if the proposed lessee would be interested in defendant's property, situate on the opposite side of the street from the Burwell-Harris property, as a site for the proposed theatre. In consequence of this request plaintiff wrote to the proposed lessee, and thus opened the negotiations which resulted in the lease. Plaintiff kept in touch with the negotiations, from time to time, by correspondence and otherwise, and was instrumental in procuring the lease.

During the progress of the negotiations and before the lease was executed, the question arose as to which of the parties, the lessor or the lessee, should pay plaintiff for his services. The proposed lessee declined to assume any liability to plaintiff for his services as broker, insisting that defendant as lessor should pay for such services. Plaintiff testified that at one time, Mr. Cutter, acting for the defendant, stated that he would not pay for such services, but that subsequently he called plaintiff to his office, and said that if he closed the deal, the defendant would pay plaintiff's commission. In a letter addressed to plaintiff, dated 5 May, 1925, relative to his claim for compensation for his services in the matter, defendant said: "While we might be willing to allow a moderate sum for the limited service rendered, yet this is all that we would do." An arbitration is suggested in this letter. The negotiations were thereafter closed by the execution of the lease.

It is well settled that a landowner, who has requested a real estate broker to undertake the sale or lease of his property, and who thereafter accepts the result of services rendered by the broker, in response to the request, is liable, in the absence of a special contract, for the reasonable value of the services. *Dorsey v. Corbett,* 190 N. C., 783; *Crowell v. Parker,* 171 N. C., 392. In the latter case, after a number of citations, *Walker, J.*, says: "It is undoubtedly true, as decided in those cases, that a principal cannot take the benefit of his broker's services and refuse to pay for them." There was evidence in the instant case, from which the jury could find, not only that defendant accepted the services rendered by the plaintiff, but also that these services were rendered at the request of defendant.

Defendant excepted to evidence offered by plaintiff, and admitted by the court, over defendant's objections, tending to show that considering the character and extent of the services rendered by plaintiff, and the amount to be received by defendant, by the terms of the lease, a commission of one and one-half (1½) per cent on the aggregate amount of the annual rentals, for the term of the lease, was a reasonable compensation for his services. Assignments of error based upon these exceptions cannot be sustained. Plaintiff did not allege or contend that he was entitled to recover a definite sum as commissions, because of a custom in the city of Charlotte, with respect to sales or leases on real estate, procured by brokers. The decision in *Penland v. Ingle,* 138 N. C., 457, is therefore not an authority supporting defendant's assignments of error with respect to the admission of evidence tending to show the schedule of commissions established by the real estate board of the city of Charlotte. This evidence was offered and admitted as tending to show only what sum was a reasonable compensation for plaintiff's services as a broker. It was competent for that purpose, as the jury was instructed by the court, both at the time the evidence was offered and again in the charge. The court in its charge expressly instructed the jury that the defendant was not bound by the rules of the Charlotte Real Estate Board, and that they should consider these rules only as evidence tending to show what sum was a reasonable commission for plaintiff's services in procuring the lease.

Defendant's assignments of error based upon exceptions to the refusal of the court to give certain instructions as requested, and also to certain instructions as given in the charge, present the same question as that presented by its exceptions to the admission of evidence. These assignments of error cannot be sustained. The refusal of the court to give the instructions requested, and the instructions as given in the charge are supported by *Trust Co. v. Goode,* 164 N. C., 20. In that case, this Court quotes with approval from *Hoadley v. Bank,* 71 Conn., 599, 44 L. R. A., 321, as follows: "When an owner places land with a real estate broker for sale, he agrees, in the absence of any special contract, to pay the customary commissions or brokerage, in case a sale is consummated with a purchaser who was led to begin the negotiations through the intervention of the broker." Where there is evidence, as there was in the instant case, that the customary commissions were reasonable, the jury may consider such customary commissions in determining what sum is a reasonable compensation for services rendered in the absence of a special contract. In the absence of evidence that the customary commissions are reasonable, they would not be competent upon an issue involving only reasonable compensation for services rendered.

In the instant case, the services were completed when the lease was procured. Defendant's prayers for instructions based upon its contention that the commissions should be based upon the rental to be received for the first year of the term only, or upon the present cash value of the aggregate sum to be received by the defendant, under the lease, were properly refused. The decision in *Thomas v. Gwyn,* 131 N. C., 460, does not support assignments of error based upon exceptions to such refusal for the reason that the contract under which the services were rendered by plaintiff in the instant case is essentially different in its terms from the contract in that case.

Defendant assigns as error the inclusion of interest from 5 June, 1925, in the judgment, for that the jury found that the plaintiff is entitled to recover the sum of eleven thousand eight hundred and fifty dollars ($11,850), without including interest on said sum. This sum is due, by contract, and under C. S., 2309, bears interest from the date on which it was due. All the evidence shows that the services of plaintiff were completed prior to 5 June, 1925, and that demand for payment was made prior to said date. There was no error in the judgment with respect to interest. *Bryant v. Lumber Co.,* 192 N. C., 607; *Perry v. Norton,* 182 N. C., 585; *Croom v. Lumber Co.,* 182 N. C., 217; *Chatham v. Realty Co.,* 174 N. C., 671. The judgment is affirmed. We find

No error.

LEWIS HENRY MILLS ET AL. v. L. F. MILLS.

(Filed 9 May, 1928.)

1. **Wills—Caveat—Parties Without Notice Not Estopped from Filing Second Caveat to Will.**

   The heirs at law of a deceased testator whose will is duly probated and who have no knowledge of proceedings to caveat the will, and who were not cited under the provisions of C. S., 4159, are not estopped to file a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded.

2. **Partition—Action for Partition—Effect of Order for Partition and Rights of Purchaser Thereunder.**

   While the heirs at law of a deceased person may not be estopped under certain circumstances by a former proceeding from again filing a caveat to a will, the purchaser at the partition sale of the lands devised, made under order of the court, and obtaining a deed, is a purchaser for value without notice, and the deed made to him gives him title to the lands.

3. **Wills—Probate—Will Probated in Common Form Not Subject to Collateral Attack.**

A will probated in common form is not subject to collateral attack, but is binding or conclusive until set aside in a direct proceeding. C. S., 4145.

CIVIL ACTION upon an agreed statement of facts, before *Grady, J.*, 9 February, 1928, of PITT.

The judgment contains the essential facts and is as follows:

"This cause coming on to be heard before his Honor, Henry A. Grady, judge holding the courts of the Fifth Judicial District, at chambers in Clinton, North Carolina, and being heard on the statement of agreed facts filed in this cause, and it appearing from the facts agreed that Anne Elizabeth Mills died testate in the year 1924, and by her last will and testament devised her land to the children of her three brothers, and that a caveat to said will was filed after said will had been duly proven and probated in common form and that citation notice of the filing of said caveat was issued to the three executors of said will, who were legatees thereunder, and that said caveat was filed about one year after the probate of said will in common form and that the caveat to said will came on for trial at March Civil Term, 1927, Pitt Superior Court, and was tried before his Honor, E. H. Cranmer, judge presiding, and a jury, and the following issue having been submitted to the jury, to wit:

"Is the paper-writing propounded and every part thereof, the last will and testament of Anne Elizabeth Mills?" And the jury having answered the issue "Yes," and that judgment at said term of said court was signed by Judge Cranmer adjudging and decreeing that the paper-writing propounded for probate in solemn form and every part thereof is the last will and testament of Anne Elizabeth Mills.

And it further appearing to the court that the legatees in said will on 3 September, 1927, filed a special proceeding in the Superior Court of Pitt County, asking for the sale of said lands for the purpose of making partition among the legatees in said will, and that a decree was made in said special proceedings appointing F. C. Harding, commissioner of the court, and ordering a sale of said lands, and that the said F. C. Harding, as commissioner in said cause after due and lawful advertising of said land for public sale, sold said land at public sale before the courthouse door in Greenville, to the highest bidder for cash, on 27 October, 1927, and that L. F. Mills became the last and highest bidder at said sale for said lands for $9,975.00, that said sale was duly reported to the court and confirmed and said commissioner was authorized and directed by a decree in said special proceeding to execute a deed of conveyance to L. F. Mills, the purchaser, upon the payment by him of his bid for said land.

It further appearing to the court that L. F. Mills has refused to accept said deed of conveyance and pay the purchase price bid by him for said land at said sale for the reason that some of the relatives of Anne Elizabeth Mills other than the legatees named in the will of Anne Elizabeth Mills who were not served with notice or citation of the filing of the caveat referred to claim an interest in said lands.

Upon all of the facts set out herein and in the statement of facts agreed filed in this cause it is ordered, adjudged and decreed that the judgment rendered in the proceeding of the caveat above referred to by Judge Cranmer at March Term, 1927, of Pitt Superior Court based on the finding of the jury in their answer to the issue hereinbefore set out vests a good and indefeasible title in fee simple in the legatees referred to in the devise of the lands of Anne Elizabeth Mills in her last will and testament, and that the relatives of the said Anne Elizabeth Mills, other than those to whom she devised her lands in said will are estopped from claiming any interest in said land, and it is further ordered and decreed that the conveyance by F. C. Harding, commissioner, of the lands referred to in said will, to L. F. Mills, the purchaser at the sale of said lands, made by said commissioner, will convey to the said L. F. Mills a good and indefeasible title in fee simple to the lands referred to in the last will and testament of Anne Elizabeth Mills."

From the foregoing judgment the defendant appealed.

R. B. Lee for plaintiffs.
Sam I. Carson and F. C. Harding for defendant.

BROGDEN, J. Are the heirs at law of a testatrix, uncited in accordance with C. S., 4159, and not otherwise cognizant of a caveat in which the will is upheld by the verdict of a jury, estopped to file a second caveat to the will within the statutory period, as against an innocent purchaser for value?

It appears from the judgment and the agreed statement of facts that the will of testatrix was probated in common form in January, 1924. The distinction between probate in common and solemn form is clearly expressed by *Ruffin, C. J.*, in *Redmond v. Collins,* 15 N. C., 430: "To enable the propounder to bind others a decree is taken out by him authorizing him to summon all persons, 'to see proceedings,' not to become parties, but to witness what is going on, and take sides if they think proper. If the propounder does not choose to adopt that course, he may at once take his decree; which in relation to this subject is called proving the will in common form. If he take out a decree and summon those in interest against him, 'to see proceedings' they are concluded, whether they appear and put in an allegation against the will or not, and as against those summoned this is called probate in solemn form."

Again *In re Will of Chisman,* 175 N. C., 420, the Court held: "The probate of a will in common form is an *ex parte* proceeding, and no one interested is before the clerk except the propounders and witnesses. When an issue of *devisavit vel non* is raised by caveat, it is tried in the Superior Court in term by a jury. Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will *per testes* in solemn form."

Under all the authorities a probate in common form is not subject to collateral attack, but is binding and conclusive until set aside by a direct proceeding. C. S., 4145.

Until the enactment of C. S., 4158, there was no statute of limitations in this State prescribing the time within which a caveat could be filed.

The caveat in the case at bar was duly filed to the will of testatrix by a relative. It does not appear from the agreed statement of facts who this relative was. However, when the caveat was filed it appeared that citation was issued to the three executors of the will, who are also legatees thereunder, and that no citation or notice whatsoever was given to the heirs at law of the testatrix. C. S., 4159, requires that citation shall issue to all devisees, legatees, "or other persons in interest within the State" and publication shall be made "for nonresidents." The provisions of this statute were not complied with. The plaintiffs, however, insist that the heirs at law of testatrix are estopped by the verdict of the jury and the judgment thereon establishing the validity of the will. In *Redmond v. Collins, supra,* it is declared: "But as every judicatory having any pretentions to administer a code of law so as to make it practically a just system, having respect to the rights of persons in the thing, these tribunals do not hold those bound by the sentence who had notice of the pendency of the proceedings on which it was pronounced." To the same effect is the declaration of *Pearson, J.,* in *Ethridge v. Corprew,* 48 N. C., 14: "As a matter of common justice, no one should be deprived of his rights without an opportunity of being heard. Hence, no order, sentence or decree, made *ex parte,* is conclusive; and all persons affected by it are entitled, 'of common right,' to have it set aside."

These principles are recognized *In re Beauchamp,* 146 N. C., 254, in the following language: "While the next of kin and heirs at law have the right to require probate in solemn form, this right may be forfeited, either by acquiescence or unreasonable delay after notice of the probate." *In re Will of Witherington,* 186 N. C., 152.

Under the authorities the next of kin may be barred: (1) By failure to assert their rights upon knowledge of the suit contesting the will, irrespective of whether they were cited or summoned to see proceedings. *Redmond v. Collins,* 15 N. C., 430; *In re Dupree's Will,* 163 N. C., 256; *In re Bateman's Will,* 168 N. C., 234.

(2) By being made a party to an action to construe a will and allot dower to a widow upon her dissent. *In re Will of Lloyd,* 161 N. C., 557.

(3) By statute of limitations, C. S., 4158.

(4) By citation duly issued and served. C. S., 4159.

It is obvious from the judgment and agreed statement of facts that the heirs at law of testatrix under the authorities were not made parties to the caveat proceedings by citation, nor does it appear that they were cognizant of the proceedings or charged with knowledge that the devisees in the will had taken possession of the property thereunder. Under these circumstances they are not estopped to file a second caveat. However, the filing of a second caveat cannot affect the rights of the defendant. The probate in common form is binding and conclusive until set aside by a direct proceeding. The caveat was not sustained. Hence the probate in common form is effective and the purchaser has the right to rely upon it. Therefore the purchaser is an innocent purchaser for value and the deed tendered will convey a good and indefeasible title to the property.

Affirmed.

J. FRANK FLOWERS AND ELIZABETH McCLINTOCK FLOWERS v. THE CITY OF CHARLOTTE ET AL.

(Filed 9 May, 1928.)

1. **Municipal Corporations—Public Improvements—Assessments—Restrictions in Charter Against Levy.**

   An assessment made on abutting landowners for street improvements by a city under its charter prohibiting a second assessment within ten years, applies to the entire lot when a corner one abutting on two streets improved, and when one street has been improved, an assessment within the limited ten years on the lot fronting on the other street is prohibited by the charter.

2. **Same—Statutes—Repeal and Revival.**

   Where a special act prohibits a second assessment for street improvements on the same land within ten years, an assessment made under a general statute, which is merely cumulative and does not repeal special acts, is void when made in conflict with the provisions of the special act.

APPEAL by defendants from *Harding, J.,* at April Term, 1928, of MECKLENBURG. Affirmed.

Action for judgment declaring void an assessment upon lot of land owned by plaintiffs for street improvements, made on 20 February, 1923, and enjoining sale of said lot for the collection of the amount assessed. From judgment upon facts agreed defendants appealed to the Supreme Court.

Thaddeus A. Adams and J. F. Flowers for plaintiffs.
John A. McRae and Frank W. Orr for defendants.

CONNOR, J. Plaintiffs own a lot of land located at the northwest corner of Louise and Sunnyside avenues, in the city of Charlotte. The frontage of said lot on Louise Avenue is about 110 feet, and on Sunnyside Avenue is about 167 feet.

Louise Avenue was paved by the city of Charlotte, under the provisions of its charter, in 1913. An assessment for its *pro rata* part of the cost of said paving was made by the city of Charlotte on said lot, on 23 October, 1913. The said assessment was valid in all respects, and the amount so assessed is a lien on said lot. This amount was $423.36, and is now due, with interest at six per cent from 1 March, 1914, no part of same having been paid. The assessed taxable value of said lot in 1913 was $2,400. The charter of the city of Charlotte, under which the assessment was made for the paving on Louise Avenue, contains a provision as follows: "*Provided further,* that no assessment against any piece of property improved as in this act provided, shall in any case exceed the amount of special benefit to or enhancement in value of said property by reason of said improvements, or twenty per cent of the assessed taxable value thereof, and where permanent street improvements shall be made the property bearing such assessments shall not be so assessed again until after the expiration of ten years from the date of the last preceding assessment." Section 7, ch. 251, Private Laws 1911.

Sunnyside Avenue was paved by the city of Charlotte under the provisions of chapter 56, Public Laws 1915, and amendments thereto, now C. S., 2703-2728. An assessment for its *pro rata* part of the cost of said paving was made by the city of Charlotte on said lot on 20 February, 1923. The said assessment was valid in all respects, and the amount so assessed is a lien on said lot, provided the city of Charlotte had the power to make said assessment. The amount assessed upon plaintiff's lot, on account of the paving of Sunnyside Avenue was $868.40; five installments are now due and unpaid. At the date of the assessment for the paving of Sunnyside Avenue, plaintiff's lot was assessed for taxation at $8,635.00.

Upon the facts agreed, the court was of the opinion, and so adjudged, that the amount assessed upon plaintiff's lot for the permanent improvement of Louise Avenue, to wit, $423.36, was a lien upon said lot; but that only the sum of $56.64 of the amount assessed for the permanent improvement of Sunnyside Avenue was a lien upon said lot, and that said lot was not subject to a lien in favor of the city of Charlotte, for the remainder of said assessment.

The judgment must be affirmed, upon the authority of *Charlotte v. Brown,* 165 N. C., 435, unless the limitation upon the power of the city of Charlotte, with respect to assessments for permanent street improvements, contained in its charter, is not applicable to the assessment made by said city on plaintiffs' lot for paving Sunnyside Avenue. This latter assessment was made before the expiration of ten years from the date of the last preceding assessment. The amount assessed for permanent improvements on Sunnyside Avenue, added to the amount of the previous assessment exceeds twenty per cent of the assessed taxable value of the lot at the date of the first assessment. The assessment on account of the improvements made on Sunnyside Avenue is void, if the limitation contained in the charter of the city of Charlotte is applicable. In *Charlotte v. Brown, supra,* it is said: "The fact that the lot is a corner lot, and is in two improvement districts, is immaterial. It is the taxable value of the entire lot that is to be considered in fixing the limit beyond which the assessment may not go. The excess of twenty per cent being void, under the charter of the plaintiff, the defendant may enjoin the collection of the excess." This was said of one assessment upon a corner lot which exceeded twenty per cent of its assessed taxable value. The question as to whether the limitation as to the amount which may be assessed against a specific lot applies where there is a second assessment following an assessment which did not amount to twenty per cent of the assessed taxable value of the lot, is not presented by this appeal. The court below was of opinion that it did not apply, and that the city had power to make a second assessment within ten years, provided the amount of the second assessment, added to the amount of the first assessment, did not exceed the limitation. Plaintiff did not except to or appeal from the judgment. Whether or not the city of Charlotte, under its charter, has the power to make repeated assessments upon the same lot of land, for street improvements, within a period of ten years, provided the total sum of all the assessments does not exceed twenty per cent of the assessed taxable value of the lot, at the date of the first assessment, is not presented on this record. The question is, therefore, not decided. The question here presented is whether the assessment for improvements on Sunnyside Avenue is void, under the charter, for that same was made before the expiration of ten years from the date of the assessment for improvements on Louise Avenue; and, if so, whether the provisions of the charter are applicable to the second assessment.

We think it manifest from the language of the proviso in section 7 of chapter 251, Private Laws 1911, that under the charter the second assessment, having been made before the expiration of ten years from the date of the first assessment is void, and this without regard to the fact that the second assessment was made under the provisions of Article IX, ch. 56 of the Consolidated Statutes. The language is, "Where permanent street improvements shall be made, the property bearing such assessments shall not be so assessed again, until the expiration of ten years from the date of the last preceding assessment."

It is provided by C. S., 2704, that Article IX, ch. 56 of the Consolidated Statutes shall apply to all municipalities; "It shall not, however, repeal any special or local law or affect any proceedings under any special or local law for the making of street, sidewalk, or other improvements hereby authorized, or for the raising of funds therefor, but shall be deemed additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided."

The principle discussed and applied in *Bramham v. Durham*, 171 N. C., 196, are applicable to the decision of the question as to whether the provisions of its charter, denying the city of Charlotte power to make a second assessment upon a lot for permanent street improvements within ten years after a previous assessment upon the lot for the same purpose made under its charter, apply where the second assessment is made under the provisions of Article IX, ch. 56, Consolidated Statutes. Upon these principles we hold that the question must be answered in the affirmative. Defendants' exception to the judgment cannot be sustained. The assessment made by the city of Charlotte upon plaintiffs' lot for improvements on Sunnyside Avenue is void; the amount of such assessment is not a lien upon said lot. The judgment is

Affirmed.

NATIONAL FURNITURE MANUFACTURING COMPANY v. W. E. PRICE, RECEIVER, C. D. NEVITT FURNITURE COMPANY.

(Filed 9 May, 1928.)

1. **Sales—Conditional Sales—Contracts Construed as Conditional Sales.**

A contract under which the seller ships to the purchaser certain goods, to which the latter acquires title upon the payment of the specified purchase price, is a conditional sale, requiring registration as against the rights of creditors. *Trust Co. v. Motor Co.*, 193 N. C., 663, cited and applied.

2. **Receivers—Title to and Possession of Property—Conditional Sales—Registration.**

A receiver represents creditors of an insolvent corporation, and while a conditional sale to the corporation does not require registration as between the parties, after the receivership its validity as to the rights of creditors depends upon its registration in conformity with C. S., 3312.

APPEAL by plaintiff from *Schenck, J.,* at November Term, 1927, of MECKLENBURG. Affirmed.

From judgment overruling its exceptions to the report of the receiver, upon its claim against the insolvent corporation, and adjudging that plaintiff is entitled to prove said claim only as an unsecured creditor, without preference as to its payment out of assets in the hands of the receiver, plaintiff appealed to the Supreme Court.

H. L. Taylor and Fred M. Parrish for plaintiff.
Thaddeus A. Adams and J. F. Flowers for defendant.

CONNOR, J. This is an appeal from a judgment overruling plaintiff's exceptions to the report of the receiver of the C. D. Nevitt Furniture Company, an insolvent corporation, and adjudging that upon the facts found by said receiver, plaintiff is not entitled to prove its claim against said insolvent corporation as a secured creditor, or to have a preference in the payment of its claim out of assets of said corporation, in the hands of the receiver.

Pursuant to a contract, in writing, dated 25 February, 1927, the National Furniture Manufacturing Company, of Winston-Salem, N. C., delivered to the C. D. Nevitt Furniture Company, of Charlotte, N. C., certain goods, wares and merchandise, at the invoice price of $1,548.00. Thereafter the C. D. Nevitt Furniture Company, in the conduct of its business as a retail furniture dealer, sold a large part of said merchandise. On 21 June, 1927, the date on which the said company was adjudged insolvent and on which the receiver was appointed, it had on hand only a small part of said merchandise. This merchandise, invoiced at $258.00, passed into the hands of the receiver, as assets of the insolvent corporation. The total cash on hand at said date was $8.08. After due notice had been given to all the creditors, by mail, the entire assets of the corporation were sold by the receiver, who received therefor the sum of $4,300. This sum is now in the hands of the receiver for distribution among the creditors of the corporation. The contract between the National Furniture Manufacturing Company and the C. D. Nevitt Furniture Company was not registered.

Plaintiff's contention that by the terms of the contract, under which it delivered the said merchandise to the C. D. Nevitt Furniture Company, it was the owner of so much of the said merchandise as was on hand and in the possession of said company at the date of the appointment of the receiver, cannot be sustained. Nor can its contention that it is entitled to a preference in the payment of its claim out of the money in the hands of the receiver, be sustained. In support of these contentions, plaintiff contends that the contract between it and the C. D. Nevitt Furniture Company was not a conditional sale, and was therefore not required to be registered under the statute. C. S., 3312. It contends that by the terms of this contract it retained title to the merchandise delivered to the C. D. Nevitt Furniture Company, and that such title never passed to or vested in said company. We cannot, under authoritative decisions of this Court, so construe the contract. It is provided therein "that the consignee hereby guarantees the payment of all bills and accounts for the merchandise delivered under the provisions of this agreement, and hereby agrees, in case any merchandise delivered under the provisions of this agreement by the consignor to the consignee is not accounted for to the consignor, under the provisions of clause 4 of this agreement, to pay to the consignor the invoice price of said merchandise, and thereupon title to said merchandise, or the proceeds thereof, so paid for, shall pass to the consignee, and shall be exempted from the provisions of this agreement."

In *Trust Co. v. Motor Co.,* 193 N. C., 663, it is said: "If personal property is delivered by one person to another under the terms of a contract whereby the latter is to acquire the retained title to the property upon the performance of a condition, such as the payment of the purchase price at a certain time or in a designated manner or by giving his note for the price, the transaction is a conditional sale." See *Acceptance Corporation v. Mayberry, ante,* 508. This principle is applicable to the facts of the instant case.

These facts distinguish this case from *Lance v. Butler,* 135 N. C., 419. Under the contract in the latter case there was no provision by which in any event the consignees or agents should acquire title to the subject-matter of the contract. They became entitled to a part of the proceeds of the sale of the property, after the full amount of the invoice price had been paid, as compensation for their services in selling the property. It was held that the contract in that case was one of agency, and was not required to be registered. In the instant case, upon payment of the invoice price of the merchandise, it is provided that the title thereto shall pass to the consignee. The contract is, therefore, a conditional sale, and in the absence of registration, was not valid as against creditors of or purchasers for value from the consignee or vendee. Nor was it valid as against the receiver of the corporation, who upon his appointment and qualification represents its creditors. *Observer Co. v. Little,* 175 N. C., 42.

There was no error in holding that plaintiff was not entitled to recover of the receiver the amount of the invoice price of the merchandise delivered to the insolvent corporation by the plaintiff, which passed into his hands as assets; nor is plaintiff entitled to payment of its claim out of the sum in the hands of the receiver, derived from the sale of the assets of the corporation, in preference to other creditors, because the corporation had failed to account for the proceeds of the sale of the merchandise sold by it prior to the receivership. There is no error. The judgment is

Affirmed.

MRS. JENNIE HILL, ADMX., MARVIN HILL v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 9 May, 1928.)

1. **Railroad—Operation—Injury to Person on Track—Nonsuit—Negligence.**

   Where there is evidence tending to show that at a highway grade crossing with a railroad the railroad had piled its crossties so high as to obstruct the view of its train, which came without signals or warnings, and struck an automobile and killed its occupants, it is sufficient evidence of the actionable negligence of the railroad company to take the case to the jury in the administratrix's action to recover damages for the killing of her intestate.

2. **Pleadings—Complaint—Correcting Name of Plaintiff—Correction Does Not Constitute New Action.**

   Where one administratrix has renounced her right, and a second has been appointed, and the second administratrix has brought action and made her mark to the complaint, the action of the trial judge in correcting a mistake in the summons and complaint by changing the name of the first administratrix to that of the second, does not change the cause of action, and does not constitute error. C. S., 547.

CIVIL ACTION before *Oglesby, J.*, at October Term, 1927, of STANLY.

Plaintiff alleged and offered evidence tending to prove that on 20 March, 1926, her intestate was a passenger in an automobile on the Albemarle-Aquadale highway; that said public highway crosses at grade the track of defendant near Aquadale and is a much used highway. The car in which plaintiff was riding was driven by Charles S. Green. Raymond Green and Walter J. Green were also passengers in the car. As the car neared the crossing a train of defendant was approaching from the east and traveling west. The automobile approached the crossing from the south side. The evidence further tended to show that crossties were piled on the right of way of defendant about 25 feet from the highway and about 12 feet from the railroad and on the south side thereof and on the east side of the highway. The evidence further tended to show that upon discovery of the train the driver of the automobile turned quickly to the right, overturning the automobile and throwing the occupants in front or under the train, and as a result all were killed.

At the conclusion of plaintiff's evidence there was judgment of nonsuit, from which judgment plaintiff appealed.

Bogle, Bogle & Morton for plaintiff.
J. R. Price and U. L. Spence for defendant.

BROGDEN, J. Was there any evidence of negligence to be submitted to the jury?

A. J. Green, witness for plaintiff, testified that he saw the young man in the automobile and talked to them about one hundred and fifty yards from the crossing. "After I saw the boys drive off in the track of the highway I wouldn't think it was more than four minutes until I heard the accident. I heard of it pretty quick I think. I had not gone into my house after I left those boys before I heard of the accident. I didn't hear any blow or noise of the train. . . . We noticed those crossties piled on the right of way of the railroad at that time. They run up about twenty-five feet from the highway and about twelve feet from the railroad. They were on the south side of the railroad. The boys were approaching the railroad from the south side. The ties were on the east side of the dirt road. . . . The train was coming evidently from the east. It was headed west. The piling of those crossties where they were would have the effect to almost break off the view there, very little view. The height of the pile of ties was somewhere like that above my head. I am six feet tall I suppose. They were six and a half feet high. I think the ground on which the crossties were piled was from two to three feet higher than the railroad track."

There was other evidence to the effect that the crossties obscured the vision of travelers except perhaps at a certain point as you approach the track. This evidence, viewed in its most favorable light, tends to show that the view of a traveler upon the highway was obstructed and that the train gave no signal. It was the duty of the defendant to give reasonable and timely notice of the approach of its train by ringing the bell or blowing the whistle, and a failure to perform such duty is negligence. Furthermore, the testimony of witnesses near by that they heard no bell or whistle is evidence that no such signal was given. *Goff v. R. R.*, 179 N. C., 219; *Perry v. R. R.*, 180 N. C., 290; *Earwood v.*

R. R., 192 N. C., 27. It is true that other testimony offered by the plaintiff tended to show that proper signals were given. However, the weight and credibility of the testimony is for the jury.

In the summons, complaint and other papers filed in the cause the name of Mrs. Lillie Bett Hill, administratrix of Marvin Hill, appears as plaintiff. Lillie Bett Hill was the widow of the deceased. At the conclusion of the evidence the plaintiff moved to have the name of Mrs. Jennie Hill, administratrix of Marvin Hill, substituted in the summons, complaint and other papers in lieu of Mrs. Lillie Bett Hill. The defendant objected to this substitution. The court found as a fact that Lillie Bett Hill renounced her right to administer upon the estate of her husband and requested the clerk to appoint Mrs. Jennie Hill instead. Thereupon in August, 1926, Mrs. Jennie Hill was duly appointed administratrix of said deceased. Mrs. Jennie Hill was unable to read and write and by inadvertence her name was mistaken for that of Lillie Bett Hill. The trial judge further found that, as a matter of fact, Mrs. Jennie Hill was the identical person who made her mark to the complaint, who employed attorneys to bring the suit and who made her mark to all the papers in the cause. Thereupon, it was ordered by the court that the name of the plaintiff be corrected in accordance with C. S., 547. We do not think this constituted a new cause of action, but was a mere correction of the record in order to make it speak the truth, and therefore approve the action of the trial judge in this particular and disallow the motion for *certiorari* made by the defendant.

New trial.

A. B. COLEMAN v. CAROLINA THEATRES, INCORPORATED.

(Filed 9 May, 1928.)

Receivers—Management and Disposition of Property—Leases.

Where the lessee corporation, operating a theatre, has become insolvent and is in the hands of a receiver, and its assets consist largely of the value of its lease with the plaintiff, the lessor, who seeks to cancel the lease for the nonpayment of rents due thereunder, and it is made to appear that the receiver has put valuable improvements on the building, and that it is to the best advantage of creditors that the receiver operate under the lease: *Held*, the judgment of the court that the receiver operate the theatre under the lease upon paying all rent in arrears, and promptly paying the rent as it may accrue in the future, is not error, there being no provision in the lease that the lessor have an option to reënter and declare the contract void. C. S., 2343, 2372.

APPEAL by petitioners from an order of *Harding, J.*, at Chambers, 12 March, 1928. Affirmed.

Tillett, Tillett & Kennedy for plaintiff.
Bourne, Parker & Jones for petitioners.
Taliaferro & Clarkson for receiver.

ADAMS, J. The plaintiff was vice-president, director, and stockholder in the defendant corporation which had been engaged in the business of operating a chain of moving picture theatres. He alleged that the defendant had become heavily indebted and unable to meet its obligations; that claims aggregating several thousand dollars had become due; that several claims against the defendant had been placed in the hands of attorneys for collection, and that defendant had no funds with which to pay its indebtedness. On his application a temporary receiver was appointed on 12 February, 1928.

After the receiver had been appointed the petitioners filed a petition in the cause setting up an agreement between J. H. Buckner and Anna K. Buckner, under whom the petitioners claim, and the defendant corporation. They alleged that the defendants entered into possession of the buildings and equipment described in the agreement, began the operation of a moving picture show in accordance with its terms, and thereafter made default in the payment of the rent due for the months of January and February, 1928. They alleged that J. H. Buckner had become largely indebted and that neither his estate nor that of Anna K. Buckner was financially able to pay its indebtedness and that the petitioners are entitled to the possession of the property held by the defendants for the purpose of leasing it on terms not less favorable than those for which it had been taken by the defendant. Neither the plaintiff nor the receiver impeaches the regularity of this proceeding. In the order of Judge Harding it is recited that the defendant was in arrears for rents amounting to $625, but that the defendant had expended large sums of money in rearranging the building and in installing equipment therein and that the lease and equipment form one of the main assets of the defendant in the hands of the receiver; also, that it is for the best interest of all parties that the validity of the lease be maintained until the right of parties and the creditors can be properly investigated and determined. During the hearing of the petition and before judgment therein the receiver tendered to the petitioners all rents due, together with all costs which they had lawfully incurred. It was thereupon adjudged that the petition be denied, that the receiver continue in possession of the property until further orders, without prejudice to the rights of the petitioners in case of future default in the payment of rents to recover as therein provided. The question for decision is whether there was error in the judgment. In Consolidated Statutes, section 2343, it is provided that in all verbal or written leases of real property in which is fixed a definite time for payment of rent, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand for all past due rent is made by the lessor or his agent upon the lessee. The agreement in question, or lease, contains substantially the provisions of this section. Section 2372, is as follows: "If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed."

In *Ryan v. Reynolds,* 190 N. C., 563, these two sections were referred to, and it was held that as tender of the rents and costs had been made, the action would be dismissed and the tenants allowed to remain in possession. We see no reason why the principle stated in this decision is not controlling upon the facts appearing of record. *Midimis v. Murrell,* 189 N. C., 740, is distinguishable for the reason that the lease therein construed provided that upon failure to pay the rent the lessor should have the option to declare the contract null and void. There is no equivalent provision in the lease under consideration. Judgment

Affirmed.

JAMES R. PENTUFF v. JOHN A. PARK, O. J. COFFIN AND TIMES PUBLISHING COMPANY.

(Filed 9 May, 1928.)

Appeal and Error—Requisites and Proceedings for Appeal—Rules of Court.

Where the appellant has failed to have his case docketed in time under Rule 5 of the Supreme Court (192 N. C., 841), in order to preserve his appeal it is required that he file an application for a *certiorari,* addressed to the discretion of the Supreme Court, and show a good and sufficient reason for the granting of his motion therefor; and the mere fact that the term of Superior Court extended beyond the time of the convening of the Supreme Court does not prevent the case from being docketed and heard at that term, the time of the judgment appealed from being considered under the provisions of our statute as the first day of the term at which it was tried. C. S., 613.

APPEAL by plaintiff from *Finley, J.,* at August Term, 1927, of CABARRUS.

Civil action for libel, tried at the August Term, 1927, Cabarrus Superior Court, upon issues raised by the pleadings, which resulted in a verdict and judgment for the defendants, from which the plaintiff appeals, assigning errors.

Upon the call of the docket from the district to which the case belongs, there was a motion by defendants to dismiss the appeal for failure to prosecute same as required by the Rules of Practice in the Supreme Court. This motion was allowed.

The plaintiff then moved to reinstate the appeal for cause set out in the motion.

Zeb. V. Turlington and Caldwell & Caldwell for plaintiff.
Albert L. Cox and A. L. Purrington, Jr., for defendants.

STACY, C. J. This was a civil action tried at the August Term, 1927, Cabarrus Superior Court, which was a three weeks term, commencing 15 August and ending 3 September. The case was tried during the first week of the term and resulted in a verdict and judgment for the defendants. Judgment was signed 27 August, 1927. The plaintiff gave notice of appeal to the Supreme Court, and was allowed 50 days within which to prepare and serve statement of case on appeal, while the defendants were allowed 30 days thereafter to file exceptions or counter statement of case. There was no application for a *certiorari* at the Fall Term, 1927, of this Court, the next succeeding term commencing after the rendition of the judgment in the Superior Court, and the term to which the appeal should have been brought.

True, the August Term of Cabarrus Superior Court at which the case was tried did not adjourn until after the commencement of the Fall Term of this Court on 29 August, 1927. But under C. S., 613 "judgments rendered in any county by the Superior Court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term." Rule 5 of the Rules of Practice in the Supreme Court (192 N. C., p. 841) provides, among other things, that the transcript of record on appeal from a judgment "rendered before the commencement of a term of this Court" must be brought to such term, the next succeeding term, and docketed here 14 days before entering upon the call of the district to which the case belongs, with the proviso that appeals in civil cases (but otherwise in criminal cases) from the First, Second, Third and Fourth districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

The single modification of this requirement, sanctioned by the decisions, is, that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for a *certiorari,* which motion may be allowed by the Court in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right.

Indeed, if the record and transcript are not docketed here at the proper time and no *certiorari* is allowed, the court below, on proof of such facts, may, on proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken. *Dunbar v. Tobacco Growers,* 190 N. C., 608, 130 S. E., 505; *Jordan v. Simmons,* 175 N. C., p. 540, 95 S. E., 919; *Avery v. Pritchard,* 93 N. C., 266.

We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the Legislature, (2) by order of the judge of the Superior Court, (3) by consent of litigants or counsel. The Court has not only found it necessary to adopt them but equally necessary to enforce them and to enforce them uniformly.

On facts identical in principle with those appearing on the present record, the appeal in the case of *Stone v. Ledbetter,* 191 N. C., 777, 133 S. E., 162, was dismissed *ex mero motu.* For a similar reason, the motion, lodged by the defendants, to dismiss the appeal in the instant case was allowed. This ruling is further supported, either directly or in tendency, by the following recent authorities: *Covington v. Hosiery Mills, ante,* 478; *S. v. Crowder, ante,* 335; *S. v. Taylor,* 194 N. C., 738; *S. v. Angel,* 194 N. C., 715; *Womble v. Gin Co.,* 194 N. C., 577; *Waller v. Dudley,* 193 N. C., 354, 137 S. E., 149; *Trust Co. v. Parks,* 191 N. C., 263, 131 S. E., 637; *Finch v. Comrs.,* 190 N. C., 154, 129 S. E., 195; *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562; *S. v. Surety Co.,* 192 N. C., 52, 133 S. E., 172.

No sufficient cause having been shown to warrant a reinstatement of the appeal, the motion to this effect must be denied.

Appeal dismissed.

Motion to reinstate disallowed.

WINCHESTER-SIMMONS COMPANY v. L. H. CUTLER, SR., ET AL.

(Filed 9 May, 1928.)

Receivers—Title to and Possession to Property—Property Bequeathed to Insolvent.

A bequest of ten thousand dollars in certain bonds to a man and his wife by entireties, when the man is indebted to the estate, which has not yet been settled, may not be anticipated upon the facts found by the trial court, and ordered to be turned over to a receiver, until a final accounting. But the judgment will stand, subject to the final accounting upon requiring the husband to give a five thousand dollar bond of indemnity, sufficient in form and approved by the clerk of the court.

APPEAL from judgment rendered by *Harris, J.*, at February Term, 1928, of CRAVEN.

Ernest M. Green for plaintiff.
Whitehurst & Barden and Ward & Ward for defendant.

BROGDEN, J. The main question in this case, in its present aspect, is, what amount is L. H. Cutler entitled to, in his own right, in the legacy of $5,000 bequeathed to him by the will of Sarah E. Wadsworth? When such amount is ascertained it must be paid to the receiver heretofore appointed in the cause. The former judgment ordered the defendant to turn over to the receiver $5,000 of said bonds. The present judgment orders him to turn over to L. E. Lancaster, as trustee, the sum of $4,000 of said bonds. Obviously, these two conflicting orders cannot stand. It appears that the defendant has hypothecated certain bonds aggregating $4,000. He contends that these bonds are to be charged against his interest in the legacy. It is clear that Mr. and Mrs. Cutler are each entitled to $5,000 of said bonds, subject of course to the payment of the indebtedness of the estate of Sarah E. Wadsworth, costs, taxes and charges of administration properly assessed against the interest of each legatee. In order to determine the amount of said legacy coming to L. H. Cutler in his own right, an accounting is necessary for the reason that before the amount due him in his own right can be ascertained it must be determined whether or not the bonds hypothecated are properly chargeable against his individual interest in said legacy.

The record discloses that on 23 August, 1927, Cutler gave a stay bond in the sum of $5,000. We assume that this bond is in force and in proper form to protect the creditors of said defendant pending the final accounting and settlement of said estate. If such bond is not in force or not in proper form for such purpose, the defendant has leave to give such bond in the sum of $5,000 to be approved by the clerk and to hold the property until his final account as executor has been filed and approved as provided by law.

Modified and affirmed.

J. J. MISENHEIMER v. FELIX HAYMAN.

(Filed 9 May, 1928.)

Negligence—Evidence—Sufficiency—Nonsuit—Master and Servant.

Where the plaintiff seeks damages in his action against the defendant for the negligence of the latter's delivery truck driver in colliding with the plaintiff's automobile on the highway, the evidence, as to the identity of the defendant's driver and that he was acting within the scope of his employment at the time of the injury complained of, is sufficient to take the case to the jury and deny defendant's motion for a nonsuit under the facts of this case.

APPEAL by defendant from *Harding, J.*, at December Special Term, 1927, of MECKLENBURG.

Action for damage to an automobile alleged to have been caused by defendant's negligence. The issues of negligence, contributory negligence and damages are answered in favor of the plaintiff. Exception and appeal by defendant.

C. A. Duckworth and James A. Lockhart for plaintiff.
John M. Robinson and S. E. Vest for defendant.

ADAMS, J. The plaintiff alleges that on the occasion complained of he was the owner of a Buick sedan and the defendant of a Ford delivery truck; that the defendant was engaged in the market business in the city of Charlotte; that Henry Franklin, while engaged as an employee in the defendant's business, damaged the plaintiff's car by negligently running the defendant's truck against it and causing it to plunge down an embankment. The defendant denied the plaintiff's material allegations and pleaded contributory negligence. He introduced no evidence and moved to dismiss the action as in case of nonsuit. The motion was denied and from the judgment rendered upon the issues the defendant appealed.

The determination of the defendant's exceptions pivots on the two questions whether there is more than a scintilla of evidence tending to identify the truck as the property of the defendant, and to show that the driver was in the service of the defendant when the injury occurred.

In his answer the defendant admits that Henry Franklin was in his employment and, at one time operated one of his delivery trucks. On the disputed points there was evidence tending to show that the defendant was engaged in the meat-market business and ran a delivery service; that the truck which struck the plaintiff's car bore on its body the words, "Felix Hayman" or "Hayman's Meat Market"; that it was driven by a colored man; that trucks corresponding to it in description had been seen at the defendant's place of business; that a truck of similar description had often been noticed passing along the road on which the collision occurred.

Unquestionably there is evidence of the driver's negligence, and in our opinion there is sufficient evidence of the defendant's ownership of the truck. The defendant contends, however, that if this be admitted it would still be incumbent upon the plaintiff to show that the driver was engaged in the performance of the defendant's business. This, of course, is a correct proposition; but there is at least some evidence that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business. *Freeman v. Dalton,* 183 N. C., 538; *Clark v. Sweaney,* 176 N. C., 529. In *Tyson v. Frutchey,* 194 N. C., 750, and *Grier v. Grier,* 192 N. C., 760, there was direct evidence that the driver was not employed in the defendant's business at the time of the injury. The defendant was engaged in selling and delivering meat to his customers, and there is evidence that his truck was frequently seen on the road in question coming from and returning to the city, according to one witness, sometimes once a day and sometimes every other day. While the evidence on this point is not necessarily convincing, we cannot hold as a matter of law that it is devoid of such probative force as not to require its submission to the jury.

No error.

J. W. PICKLER AND J. W. LAMPLEY, COPARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF PICKLER-LAMPLEY CONSTRUCTION COMPANY v. PINECREST MANOR, INCORPORATED.

(Filed 9 May, 1928.)

1. **Appeal and Error—Review—Scope and Extent of Review—Findings of Fact by Referee and Trial Court Not Reviewable.**

The facts found upon supporting evidence and approved by the trial judge, and also the facts likewise found by him, are not reviewable in the Supreme Court.

2. Arbitration and Award—Right to Arbitration—Waiver.

As to whether a clause in a building contract providing for an arbitration is enforceable as a condition upon which one of the parties may maintain an action on the contract, *Quere?* but this is a matter that the parties may waive.

APPEAL by defendant from *Oglesby, J.*, at December Term, 1927, of MOORE.

Civil action to recover $5,567.01, balance alleged to be due on account of the construction or erection of eight cottages desired by the defendant for use in connection with its sanatorium situate near the town of Southern Pines, N. C.

Upon denial of liability and counterclaim filed by the defendant for damages occasioned by delay, etc., the cause was referred, apparently by consent, to Hon. D. B. Teague, who found the facts and reported same, together with his conclusions of law, to the court, allowing the plaintiff a recovery, after deductions awarded on defendant's counterclaim, of $4,367.01.

Upon exceptions duly filed and heard at the December Term, 1927, Moore Superior Court, the same were overruled, and the referee's findings of fact and conclusions of law were adopted and approved, from which judgment the defendant appeals, assigning errors.

U. L. Spence for plaintiff.
H. F. Seawell & Son for defendant.

STACY, C. J. It is settled by all the authorities that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.*, 177 N. C., 60, 97 S. E., 746. Likewise, where the judge, upon hearing and considering exceptions to a referee's report, makes different or additional findings of fact, they afford no ground for exception on appeal, unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony on which they are based, or some other question of law is raised with respect to said findings. *Kenney v. Hotel Co.*, 194 N. C., 44, 138 S. E., 349; *S. v. Jackson*, 183 N. C., 695, 110 S. E., 593.

Applying this rule, it would seem that the exceptions of appellant should be overruled and the judgment of the Superior Court affirmed.

The defendant's brief is devoted largely to a discussion of the question as to whether this suit can be maintained by the plaintiff because of an alleged disregard of the following stipulation in the contract between the parties:

"In case of a contention where amicable settlement cannot be reached, Mr. G. W. McKibbin shall be considered the arbiter, and in the event that his services cannot be obtained, some other architect shall take his place who meets with the approval of the contractor and the owners. In the case of a contention of this sort, the expenses incurred shall be paid by the parties who are found to be at fault."

It is the contention of the defendant that as the plaintiff made no effort to settle the matters in dispute by arbitration, as the contract provides, before bringing suit, the same should be dismissed on authority of what was said in *Webb v. Trustees,* 143 N. C., 299, 55 S. E., 719, and *Young v. Jeffreys,* 20 N. C., 357. In answer to this position, we deem it sufficient to say that the matter seems to have been waived, even if originally formidable, which may be doubted. *Williams v. Mfg. Co.,* 154 N. C., 205, 70 S. E., 290.

A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable, and that the judgment should be upheld.

Affirmed.

G. W. RAGAN v. D. & L. LEBOVITZ.

(Filed 9 May, 1928.)

Landlord and Tenant—Leases—Construction and Operation.

A provision in a contract of lease rendering the contract void in the event the premises are rendered unfit for the purpose for which it was leased by fire or otherwise is enforceable according to the tenor of the written contract, and it is reversible error for the judge to instruct the jury otherwise, and submit the question to the jury as to the reasonableness of the time in which the lessor may have to make proper repairs after the fire occurred that had rendered the premises unsuitable.

APPEAL by defendants from *Webb, J.*, at December Term, 1927, of GASTON.

Civil action to recover rent alleged to be due under a written contract.

It is stipulated in the written lease that the premises "are to be used for a department store, and not to be used for any other purpose without the written consent of the lessor," and further: "Should the premises hereby leased be destroyed or rendered unfit for use by fire or other unavoidable cause, this lease immediately becomes void."

On the trial the court instructed the jury as follows:

"The court is of the opinion, gentlemen, and so interprets this lease in question, that the lease, by reason of the fire was not void, even though the room was not fit for use for the purpose for which it was occupied. The court is of the opinion that the plaintiff had a reasonable time after the fire to put the building in the same condition as before the fire, and if he did so, and if that did not unreasonably disturb the business of defendants, then the lease between the plaintiff and defendants was not void and the question whether he did so within a reasonable time is the question for you, and the court is of the opinion that that is the crucial point in this case."

The jury returned the following verdict:

"1. Did the defendants, D. & L. Lebovitz, execute the lease, as alleged in the complaint? Answer: Yes.

"2. Were the leased premises rendered unfit for use as a department store, by fire or other unavoidable causes? Answer: Yes.

"3. Was the damage to the building such as could be repaired and was repaired within reasonable time after the fire? Answer: Yes.

"4. In what amount, if any, are the defendants indebted to the plaintiff? Answer: $300."

Judgment on the verdict in favor of plaintiff, from which the defendants appeal, assigning as their principal error the above instruction to the jury.

Ernest R. Warren and Ryburn & Hoey for plaintiff.
A. C. Jones and R. G. Cherry for defendants.

STACY, C. J., after stating the case: We think the trial court incorrectly interpreted the contract of lease between the parties, and that the third issue should not have been submitted to the jury.

The case is distinguishable from *Archibald v. Swaringen,* 192 N. C., 756, 135 S. E., 849, in that, in the *Archibald case,* there was a subsequent parol agreement between the parties relative to certain minor repairs, and this was set up in the pleadings. But here, the contract is clear and unambiguous. There is no allegation of any subsequent parol agreement relative to repairing the demised premises which, as found by the jury, were rendered unfit for use as a department store by fire or other unavoidable causes. 16 R. C. L., 962 *et seq.*

New trial.

STATE v. JOHN CLYBURN.

(Filed 9 May, 1928.)

Criminal Law—Appeal and Error—Dismissal—Rules of Court.

An appeal from the conviction of a capital felony, will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the rules of Court regulating such matters, after an examination of the record for errors appearing on its face. *S. v. Taylor*, 194 N. C., 738; *S. v. Thomas, ante*, 458, cited and approved.

Motion by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. At the January Term, 1928, Mecklenburg Superior Court, the defendant herein, John Clyburn, was tried upon an indictment charging him with a capital felony, to wit, murder in the first degree, which resulted in a conviction and sentence of death. From the verdict thus rendered and judgment entered thereon, the defendant gave notice of appeal to the Supreme Court, but this has not been prosecuted as required by the rules, albeit the defendant was allowed to appeal in *forma pauperis*. *S. v. Taylor,* 194 N. C., 738. The motion of the Attorney-General to docket and dismiss the appeal must be allowed. *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881. But this we do only after an examination of the case to see that no error appears on the face of the record, as the life of the defendant is involved. *S. v. Thomas, ante,* 458. We find no error on the present record.

Appeal dismissed.

STATE v. ED WHITTLE.

(Filed 9 May, 1928.)

Trial—Verdict—Jury.

When it is made to appear that a jury does not understand, at the time of its rendition of the verdict, instructions given them, it is not error for the trial court to further instruct them and have them again retire for deliberation, and when this is done, a judgment on the verdict is not erroneous.

APPEAL by defendant from *Schenck, J.,* at November Term, 1927, of CATAWBA. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
W. A. Self for defendant.

PER CURIAM. The defendant was convicted on the third count in the indictment which charged him with the unlawful possession of liquor for beverage purposes. As stated in appellant's brief the principal question presented is whether the verdict finally received by the court is sufficiently certain in substance as well as in form to warrant the court in proceeding to judgment. The jury came into court and, upon being asked whether they had reached a verdict, one of them replied they had—"Guilty on the first count." Another juror remarked, "That means whiskey in the house, doesn't it?" and the court replied "No, the court specifically charged you that you should not take into consideration the whiskey in the house, but only such whiskey as may have been found in the pasture." The juror replied, "We didn't so understand it." The jury were then directed to retire and make up their verdict, and were specifically instructed to say whether the defendant was guilty or not guilty. In forty-five minutes they returned and rendered the verdict appearing of record. It is evident that when the jury first came into court they attempted to return a verdict which had been made up under a misconception of the judge's instruction, and it was the duty of the judge to have them retire and return a verdict in accordance with the evidence and the instructions of the court. This was done, and we are unable to see why the verdict last returned is not sufficient, both in substance and in form. We find

No error.

STATE v. LUM RAY AND MARSHALL DEYTON.

(Filed 16 May, 1928.)

Criminal Law—Evidence—Credibility to be Given Defendant as Witness—Questions for Jury.

A witness charged with a felony, who takes the stand to testify in his own defense, is entitled to have the jury accept his testimony as that of a disinterested witness if they should find him worthy of the same belief, notwithstanding his interest, and when the judge charges the jury, without this qualification, that the law requires them to scrutinize carefully testimony of this character, to examine it thoroughly because of the great interest of the witness in their verdict, etc., it constitutes reversible error.

APPEAL by defendants from *Moore, J.,* at October Term, 1927, of YANCEY.

Criminal prosecution tried upon an indictment charging the defendants with the murder of one William Laws on 17 August, 1927.

Upon the call of the case for trial, the solicitor announced that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might disclose. The defendants entered a plea of not guilty, and undertook to justify the homicide as having been committed in self-defense.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's prison, at hard labor, for a term of not less than 15 nor more than 20 years.

Defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Watson, Hudgins, Watson & Fouts for defendants.

STACY, C. J. The validity of the trial is called in question by numerous exceptions and assignments of error, but we shall not consider them *seriatim,* as it is necessary to award a new trial for error in the following instruction to the jury:

"The defendants came upon the stand in their defense. This they had a right to do, and in examining their testimony, gentlemen, the law requires you to scrutinize their testimony very carefully, examine it thoroughly and carefully because of their great interests in the result of your verdict, and the result it might have on your verdict if they did not speak the truth by reason of their great interest in your verdict."

It has been held in a number of cases that where a defendant, in the trial of a criminal prosecution, testifies in his own behalf, it is error for the trial court to instruct the jury to scrutinize his testimony and to receive it with grains of allowance, because of his interest in the verdict, without adding that if they find the witness worthy of belief, they should give as full credit to his testimony as any other witness, notwithstanding his interest. *S. v. Graham,* 133 N. C., 645, 45 S. E., 514; *S. v. Lee,* 121 N. C., 544, 28 S. E., 552; *S. v. Collins,* 118 N. C., 1203, 24 S. E., 118; *S. v. Holloway,* 117 N. C., 730, 23 S. E., 168.

In *S. v. Lee, supra,* the rule is stated as follows: "The law regards with suspicion the testimony of near relations, interested parties, and those testifying in their own behalf. It is the province of the jury to consider and decide the weight due to such testimony, and, as a general rule in deciding on the credit of witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stands to the party; that such evidence must be taken with some degree of allowance and should not be given the weight of the evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness."

In *S. v. Byers,* 100 N. C., 512, 6 S. E., 420, where the defendant and his near relations went upon the stand as witnesses, the court directed the jury "to scrutinize their testimony carefully, because of their interest in the result, but, notwithstanding such interest, the jury might believe all they said, or part of it, or none of it, according to the conviction produced upon their minds of its truthfulness." This instruction was approved, as it contained a correct statement of the law. See, also, *S. v. Fogleman,* 164 N. C., 458, 79 S. E., 879; *Herndon v. R. R.,* 162 N. C., 317, 78 S. E., 287; *S. v. Barnhill,* 186 N. C., 446, 119 S. E., 894.

A careful examination of the charge in the instant case fails to disclose any qualification by the judge of the instruction, which the defendants assign as error. The Assistant Attorney-General concedes that the assignment is well made.

New trial.

STATE v. E. L. KING.

(Filed 16 May, 1928.)

1. **Criminal Law—Appeal and Error—Necessity for Assignment of Error.**

A statement appearing after the signature of the judge to his settlement of a criminal case on appeal that defendant excepts to the failure of the judge to charge the jury on the law of former jeopardy, without assignments of error in this respect, is alone insufficient, under the rules, to present the matter to the Supreme Court. Rule 21.

2. **Criminal Law—Former Jeopardy—Issue Thereon Must Be Submitted by Defendant—Burden of Proving Plea.**

The burden of the proof of former jeopardy in a criminal action is upon the defendant, and for it to be considered on appeal it must appear that he had aptly submitted, or offered to submit, an issue thereon.

3. **Larceny—Evidence—Sufficiency Thereof—Nonsuit.**

Under counts in an indictment charging the defendant with feloniously stealing, taking, and carrying away articles of merchandise from a storehouse and with receiving stolen goods, etc., evidence is sufficient to resist his motion as of nonsuit which tends to show that some of the identified merchandise was found in a woods near a public road, and that the defendant and two others went to the place in an automobile, and that the defendant waited in the automobile while the two others brought the merchandise from its place of concealment to the automobile.

APPEAL by defendant from *Schenck, J.*, at October Term, 1927, of LINCOLN. No error.

Indictment containing three counts charging that defendant (1) did wilfully, unlawfully and feloniously break and enter into a storehouse in Lincoln County, owned and occupied by I. C. Lowe, with intent to steal, take and carry away certain articles of merchandise, the property of the said I. C. Lowe; (2) did feloniously steal, take and carry away said articles of merchandise, and (3) did feloniously receive said articles of merchandise, knowing the same to have been theretofore feloniously stolen, taken and carried away from the storehouse of the said I. C. Lowe.

At the close of all the evidence, defendant's motion for judgment as of nonsuit upon the first count in the indictment was allowed.

From judgment upon the verdict that defendant is guilty as charged in the second and third counts in the indictment, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Carswell & Ervin for defendant.

CONNOR, J. The case on appeal in this action, as settled by the judge, upon disagreement of the solicitor for the State and counsel for defendant, with respect thereto, contains the following statement:

"The defendant in apt time enters a plea of former jeopardy as to the counts charging the defendant with receiving stolen goods, and with stealing."

At the close of the case on appeal, as signed by the judge, and beneath his signature, is the following entry:

"Defendant excepts to the failure of the judge to charge the jury about the law on former jeopardy."

There is no assignment of error on defendant's appeal to this Court based upon said alleged exception. All exceptions appearing in the case on appeal as settled by the judge are grouped and separately numbered immediately after the signature to the case on appeal as required by Rule 19, section 3. No reference is made in the assignments of error to an exception with respect to the plea of former jeopardy. The contention that there was error in the failure of the judge to charge the jury as to the law applicable to a plea of former jeopardy cannot, therefore, be considered upon defendant's appeal to this Court, although said contention is relied upon and discussed in the brief filed for defendant. Rule 21.

However, had the exception been properly taken and presented to this Court, on defendant's appeal, it would not have availed him. Defendant neither tendered an issue upon his plea of former jeopardy, nor requested the court to submit such issue to the jury. The burden was upon defendant to sustain his plea, and upon his failure to tender an issue, or to request the court to submit an issue, involving his plea of former jeopardy, to the jury, the court properly disregarded the plea. Defendant, although he had entered a plea of former jeopardy in apt time, upon his failure to tender or request the court to submit an issue arising on such plea, is deemed to have abandoned it, and to have relied solely upon his plea of not guilty. *S. v. Smith,* 170 N. C., 742; *S. v. White,* 146 N. C., 608.

Defendant relies chiefly upon his assignment of error based upon his exception to the refusal of the court to allow his motion, at the close of all the evidence, for judgment as of nonsuit, upon the second and third counts. Judgment of nonsuit was rendered, upon defendant's motion, upon the first count.

The evidence on behalf of the State tended to show that the storehouse of I. C. Lowe in Lincoln County was broken into and entered on a Sunday night in October, 1926, and that certain articles of merchandise were stolen therefrom. On Monday, the next day, articles of merchandise, similar to those stolen, some of which were identified as the same as those which were stolen from said storehouse, were found in Gaston County. This merchandise was hidden in the woods, some distance from the public road. On Tuesday, defendant with two other men came to the place where the merchandise was hidden, in an automobile driven by defendant. The other two men went into the woods, got the merchandise and took it toward the automobile where defendant was waiting for them. All three men were then arrested by officers who had seen them drive up in the automobile, and had seen the companions of defendant go into the woods, and get the merchandise which was hidden there and take it toward the automobile. This evidence was properly submitted to the jury as tending to sustain the second and third counts in the indictment. There was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit.

Assignments of error based upon exceptions to the rulings of the court with respect to the admission of evidence, offered by the State, over defendant's objections, cannot be sustained. Nor do we find error in the instructions of the court to the jury as contended by defendant. Upon a careful examination of all defendant's assignments of error, we find none that can be sustained. The judgment is affirmed.

No error.

E. M. WASHBURN v. O. B. BIGGERSTAFF.

(Filed 16 May, 1928.)

1. **Wills—Construction—General Rules of Construction.**

   In construing a devise of lands the courts will give effect to the intention of the testator as expressed in the will, and may, for that purpose reject, supply, or transfer words and phrases.

2. **Wills—Construction—Estates and Interests Created.**

   A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies: *Held*, after the death of the widow, the devise is not a trust created in the children as trustees for the "heirs of their bodies," and the devise not falling within the rule in *Shelley's case*, and there being no expression in the will to show an intent of the testator to create an estate of less degree than fee, C. S., 4162, it constitutes an estate tail, converted by our statute into a fee simple. C. S., 1734.

APPEAL by defendant from *Moore, J.*, at October Term, 1927, of RUTHERFORD. Affirmed.

Submission of controversy without action on agreed facts. J. B. Harrill died on 1 July, 1890, leaving a last will and testament containing the following devise: "I give, bequeath and devise to my beloved wife Martha L. Harrill, all my real and personal property during her natural life or widowhood, and at her death or marriage, I devise that my real property be equally divided between my two children Kansas O. Harrill and Gaston Scales Harrill to have and to hold the same during their natural lives for the heirs of their bodies, and that the personal property be equally divided between them to have and dispose of as they may elect." Surviving him were his wife, Martha L. Harrill, one daughter, Kansas O. Harrill, who has several living children, and one son, Gaston Scales Harrill, who had no children when the testator died and has none now. The testator at the time of his death was seized of a tract of land containing 32⅞ acres. The widow died after the death of the testator and the son and daughter partitioned all the lands belonging to their father at the time of his death. After the land had been divided Gaston Scales Harrill and his wife executed a deed in fee for the tract containing 32⅞ acres and the plaintiff claiming through *mesne* conveyances acquired the title. On 15 August, 1927, the plaintiff and the defendant entered into a written contract by which plaintiff was to convey to the defendant for value the tract above described; thereafter the plaintiff tendered to the defendant a deed in fee for the land with the usual covenants of warranty, and the defendant refused to accept the conveyance or to pay the purchase price for the alleged reason that the plaintiff is not the owner of the land in fee.

Upon these facts it was adjudged in the lower court that the plaintiff has title in fee and that the defendant accept the deed tendered him by the plaintiff and pay the purchase price in accordance with his contract. The defendant excepted to the judgment and appealed.

Edwards & Dunagan for plaintiff.
W. K. Harrill and Robert S. Eaves for defendant.

ADAMS, J. The devise is not controlled by the rule in *Shelley's case,* There is no limitation after a freehold, either mediately or immediately, to the heirs in fee or in tail of the first taker as a class of persons to take in succession from generation to generation. The widow is dead and the controversy is to be determined by an interpretation of the clause, "And at her death or marriage I devise that my real property be equally divided between my two children Kansas O. Harrill and Gaston Scales Harrill to have and to hold the same during their natural lives for the heirs of their bodies."

It is provided by statute that a devise of real estate shall be held and construed to be a devise in fee simple unless it shall plainly appear that the testator intended to convey an estate of less dignity. C. S., 4162; *Barbee v. Thompson,* 194 N. C., 411. But in the interpretation of the devise the cardinal purpose must be to give effect to the intention of the testator as expressed in the will; and for the purpose of arriving at his intention the court may reject, supply, or transpose words and phrases. *Gordon v. Ehringhaus,* 190 N. C., 147; *McIver v. McKinney,* 184 N. C., 393; *Pilley v. Sullivan,* 182 N. C., 493.

We do not construe the devise as an attempt to create a trust by making the son and daughter trustees "for the heirs of their bodies." This interpretation would be directly contrary to the testator's evident intention. It is quite manifest that he intended to devise his real property to his son and daughter and the heirs of their bodies. Such devise constitutes an estate-tail at common law which, under the act of 1784, is converted into a fee simple. C. S., 1734. In *Coon v. Rice,* 29 N. C., 217, the bequest was as follows: "I give and bequeath unto my daughter Elizabeth Coon, during her natural life, at the end of which to the only heirs of her body, one negro girl named Riah, this to the aforementioned to them and their heirs forever." Construing the clause, the Court said: "If the property had been land, and Joseph Richards had devised it to his daughter Elizabeth Coon for life, 'at the end of which to the only heirs of her body, this to the aforementioned, to them and their heirs,' it would in law have been an immediate estate tail, vested in Elizabeth Coon. In looking over the whole will there is not a word in it to indicate that the testator intended 'children' when he used the words 'heirs of the body of Elizabeth Coon.' These words must, therefore, have their legal effect, and inasmuch as they would have created an estate tail in Mrs. Coon if the subject-matter had been land, they in law create in her an absolute estate in Riah, she, Riah, being personal property." Judgment

Affirmed.

THE DOGGETT LUMBER CO., INC., v. LENA KELLY CONRADES ET AL.

(Filed 16 May, 1928.)

Equity—Subjects and Extent of Jurisdiction—Restraint of Sale of Land Under Deed of Trust.

The foreclosure of a deed of trust given to secure a payment due to the contractor for the erection of a building will not be restrained at the suit of the owner on the ground that an action of a materialman was then pending in court to enforce his lien, which action involved the amount he was then due under his contract, when the notes secured by the deed of trust are due and payable, and the trustee is not shown to be insolvent, and there is no allegation of fraud, oppression, or any element that would make the foreclosure inequitable.

CIVIL ACTION before *MacRae, Special Judge,* at Chambers, 18 October, 1927, of MECKLENBURG.

The defendant, Lena Kelly Conrades, owned a lot in Mecklenburg County and during the month of January, 1927, employed her codefendants, R. Fred Dunn and Henry Barringer, to erect a dwelling-house thereon. Said contractors bought from the plaintiff building material amounting to $4,245.26. On 25 January, 1927, the defendant, Lena Kelly Conrades, executed and delivered to the plaintiff a note for $3,000.00, constituting part payment for said building material, and at the same time executed and delivered as security therefor a deed of trust upon the lot. On 17 May, 1927, the plaintiff instituted a suit against the defendant, Lena Kelly Conrades, and Dunn and Barringer, contractors, to recover a balance of $1,245.26, in order to enforce a lien for said amount duly filed on the land upon which said dwelling was erected. The defendant, Lena Kelly Conrades, filed an answer alleging "that the defendant executed a note in the sum of $3,000.00 and a deed of trust to secure the same, but the said note was executed and delivered pursuant to the terms of the agreement aforesaid, of which the plaintiff had full knowledge and to which it was a party." The agreement referred to was that the construction of the dwelling-house for defendant should not exceed the cost of $4,000.00, and that the plaintiff knew of this agreement between the defendant, Lena Kelly Conrades, and her codefendants, the contractors, and as a matter of fact there was a partnership existing between the plaintiff and said contractors. After the commencement of the action, to wit, during the month of August, 1927, the trustee in the deed of trust advertised the property of the defendant for sale according to the terms of said deed of trust. Thereupon on 3 September, 1927, upon petition of defendant, Lena Kelly Conrades, a temporary restraining order was issued and the matter came on for hearing before Judge MacRae. At the hearing the trial judge found "that the deed of trust secured a note in the sum of $3,000.00 payable to the Doggett Lumber Company, which had been given in payment on account 25 January, 1927, prior to the commencement of this action in May, 1927, and that Lena Kelly Conrades admitted the execution and delivery of said note, and the court further finds as a fact that the Doggett Lumber Company was not a partner to the contract between R. Fred Dunn and Henry Barringer, and the defendant, Lena Kelly Conrades, and the court further finds as a fact that the deed of trust and the note secured thereby are past due under its terms and that the foreclosure thereof has been begun by the trustee and that no allegation is contained in the pleadings or petition, or record that the Doggett Lumber Company or the trustee is insolvent. And the court further finding that the defendant, Lena Kelly Conrades, is entitled to and can have adequate relief in law." Thereupon the trial judge dissolved the restraining order and authorized the trustee to proceed with the sale of the premises in accordance with law.

From the foregoing judgment the defendant, Lena Kelly Conrades, appealed.

R. A. Wellons for plaintiff.
J. F. Flowers for defendant.

BROGDEN, J. The trial judge found as a fact that the note secured by the deed of trust was past due and that there was no allegation that the trustee in said deed of trust was insolvent. The execution of the note and deed of trust was admitted and there is no allegation of fraud, restraint, oppression or usury in the transaction. The trial judge was therefore correct in refusing to restrain the sale of the land in accordance with the terms of the deed of trust and in accordance with the tenor of the note secured thereby. Ordinarily, an injunction will not be granted in cases of this kind where there is no allegation of insolvency. *McNamee v. Alexander,* 109 N. C., 242, 13 S. E., 277; *Land Co. v. Webb,* 117 N. C., 479, 23 S. E., 458; *Wilson v. Featherstone,* 120 N. C., 449, 27 S. E., 121; *Rope Co. v. Aluminum Co.,* 165 N. C., 572, 81 S. E., 771. However, the court in proper instances has power to restrain sales of real estate attempted to be made in pursuance of the terms of a mortgage or deed of trust. *Hayes v. Pace,* 162 N. C., 288, 78 S. E., 290.

The principle of law covering the merits of this case is thus declared by *Clarkson, J.,* in *Leak v. Armfield,* 187 N. C., 625, 122 S. E., 393. "The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously hamper business. Those interested in the equity of redemption have the right of paying off the first lien when due. We can see no equitable ingredient in the facts of this case. The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts, under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

Affirmed.

STATE v. DEWEY RAY.

(Filed 16 May, 1928.)

Parent and Child—Duties and Liabilities of Parent—Action for Nonsupport—Issues—Abandonment.

Where the husband in an action for nonsupport of a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. C. S., 4447; Public Laws 1925, ch. 290.

APPEAL by defendant from *Moore, J.,* at October Term, 1927, of YANCEY. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Charles Hutchins for defendant.

ADAMS, J. The first count in the indictment charges the defendant with the wilful abandonment of his wife and children. C. S., 4447; Public Laws 1925, chapter 290; *S. v. Bell,* 184 N. C., 701. The second charges him with wilful neglect to provide adequate support for his wife and "the children which he, the said Dewey Ray, upon the body of his said wife had theretofore begotten." The jury returned this verdict: "Not guilty of abandonment—guilty as to nonsupport of the child." There is evidence tending to show that the child referred to is illegitimate. The following instruction was given the jury: "In this instance, the defendant himself admits that he has done nothing nor helped to support the child in any way whatever. If you find that beyond a reasonable doubt, that he abandoned the child and failed to support it, it would be your duty to render a verdict of guilty."

This instruction withholds from the jury all consideration of the question whether the defendant is the father of the child. Conviction was resisted primarily on the ground that the child had been begotten after the separation between the defendant and his wife had taken place. This contention was directly relevant to the alleged wilfulness of the nonsupport. *S. v. Johnson,* 194 N. C., 378. At the time of the trial the child referred to in the verdict was only ten weeks old. The statute does not impose upon a husband the burden of supporting another man's offspring. Indeed, the indictment limits this inquiry to the wilful abandonment of the defendant's own children. For the error assigned there must be a

New trial.

STATE OF NORTH CAROLINA TO THE USE AND FOR THE BENEFIT OF THE STANDARD SUPPLY COMPANY, INC., v. VANCE PLUMBING AND ELECTRIC COMPANY, INC., AND THE METROPOLITAN CASUALTY INSURANCE COMPANY, OF NEW YORK.

(Filed 16 May, 1928.)

1. Judgments—By Default—When Judgment by Default Final May Be Rendered.

A judgment by default final is irregular when rendered for the want of an answer filed in an action upon contract for goods sold and delivered when the alleged cause, as appearing from the complaint, is not upon an expressed contract, but for the reasonable value of the goods, in which event a judgment by default and inquiry is the proper one, unless it is made to appear that the defendant has by his acts or conduct or in some recognized legal way admitted owing the amount in suit. C. S., 593, 595, 596, 597.

2. **Judgments—Setting Aside for Irregularity—Requisites Therefor.**

To set aside an irregular judgment the defendant must further show a meritorious defense.

3. **Account, Action on—Rights of Creditor—Application of Payment—Debtor and Creditor—Sales.**

A debtor owing two or more debts to the same creditor may direct when payment is made that payment be applied to a certain one of them, and upon his failure to do so, the creditor may apply it; and when neither has done so the law will apply it to an unsecured debt, or the one for which the security is most precarious, or according to an equitable view of intrinsic justice under the facts of the case.

4. **Principal and Surety—Nature and Extent of Liability of Surety—Municipal Construction.**

Under C. S., 2445, as amended by chapter 100, Public Laws 1923, the sureties on a contractor's bond for the erection of a municipal building are liable for the payment of those who furnish material used in the construction, and those doing labor therein, irrespective of the terms of the contract of indemnity, except the surety is not liable for an amount in excess of the penalty of the bond, and a judgment against the surety for an amount in excess of the penalty of the bond given is erroneous, and the surety may relieve himself from liability by paying the amount for which he is legally liable into the court for distribution.

APPEAL by the Metropolitan Casualty Insurance Company of New York, from *Sinclair, J.*, and a jury, at November Term, 1927, of FRANKLIN. Modified and affirmed.

The facts: (1) On 15 May, 1926, the defendant, Vance Plumbing and Electric Company, Inc., entered into a certain contract with the board of commissioners of Franklin County, N. C., as alleged in the complaint, "to provide all materials and perform all the labor and work in and about the installation of the *complete plumbing* in the Franklin County Home." This is admitted by defendant Insurance Company. It was agreed in this contract that "the contractor shall furnish standard form bond in the amount of $1,165." The contract price agreed upon was $2,330. The statute, C. S., 2445, makes it a misdemeanor for the public agencies mentioned not to require a bond under the contract and under the statute the total bond should have been $2,115.50.

(2) The Metropolitan Casualty Insurance Company of New York, the defendant, gave a bond for the performance of this contract in the sum of $1,165, with a stipulation "that in no event shall the surety be liable for a greater sum than the penalty of this bond."

(3) The plaintiff, the Standard Supply Company, Inc., furnished certain material to the defendant, Vance Plumbing and Electric Company, Inc., which went into the installation of the plumbing in the Franklin County Home, amounting to $1,714.67.

(4) The Vance Plumbing and Electric Company, defendant, commenced doing business with the Standard Supply Company, Inc., in 1925, and the total amount of merchandise purchased was $6,800.66. The Vance Plumbing and Electric Company, Inc., did not begin purchasing supplies for the Franklin County Home from the Standard Supply Company, Inc., until some time after the middle of July, 1926. The payments of $600 on 11 August, and $1,107.67 on 17 September, were made on account, and were applied to the oldest portion of the indebtedness of the Vance Plumbing and Electric Company, Inc., due to the Standard Supply Company, Inc. Being applied that way all of the amount was absorbed before the Franklin County Home account began. On 17 September, when the payment of $1,107.64 was made, approximately $550 worth of goods had been delivered on the Franklin County Home job. The terms were sixty days. There was nothing due on that job at that time. The $500 payment was likewise applied to the oldest portion of the Vance Plumbing and Electric Company, Inc., account. There was nothing on the checks to indicate their source, that they were payments by the commissioners of Franklin County to Vance Plumbing and Electric Company, Inc., on the Franklin County Home job. The Vance Plumbing and Electric Company, Inc., simply sent the checks to be applied on their account to the Standard Supply Company, Inc. No instructions were given to apply them to any specific account. The Vance Plumbing and Electric Company, Inc., owed no other money outside of this account being sued for by the Standard Supply Company, Inc., and the total amount of the balance of the indebtedness is $3,217.04. Included in that amount is $1,714.67, the amount of fixtures and equipment—the material that went into the Franklin County Home and for which the present action is instituted, an itemized statement of which is set out in the complaint of the plaintiff.

T. A. Polk, a witness for plaintiff, testified: "The money was applied in accordance with the instructions of your client (Vance Plumbing and Electric Company, Inc.), to the oldest portion of the account. . . . Everything was charged to a general account, and payments credited to the general account. We have not received any credits for bonded jobs. I know this because the money was paid before the bonded job money became due."

It was contended by defendant, Metropolitan Casualty Insurance Company, that the board of commissioners of Franklin County had paid to the defendant, Vance Plumbing and Electric Company, Inc., on the contract $1,980.50. The record discloses no sufficient evidence that any of the checks paid by the board of commissioners of Franklin County to the defendant, Vance Plumbing and Electric Company, Inc., went to plaintiff to be applied on the debt in controversy.

The court below charged the jury, as follows: "I direct you, gentlemen, if you find the facts to be as testified to by all the witnesses, and shown by the evidence introduced, that you will answer the issue $1,714.67, with interest from 1 January, 1927."

The issue submitted to the jury and their answer thereto was as follows: "In what amount are defendants indebted to the plaintiff? Answer: $1,714.67, with interest from 1 January, 1927."

Judgment was rendered in accordance with the verdict against the Vance Plumbing and Electric Company, Inc., and the Metropolitan Casualty and Insurance Company of New York. The defendant, Vance Plumbing and Electric Company, Inc., did not appeal.

(1) The defendant, Insurance Company, at the close of plaintiff's evidence and at the conclusion of all the evidence made a motion for judgment as in case of nonsuit, which was refused. Defendant excepted and assigned error.

(2) The defendant Insurance Company moved to reduce the amount of the verdict to the original amount of the bond, $1,165. The motion was refused, defendant excepted and assigned error.

The other material facts will be set forth in the opinion.

Perry & Kittrell and W. S. Drewry for plaintiff.
Thos. W. Ruffin for Insurance Company.

CLARKSON, J. We think the court below correct in the refusal of the motions made by defendant for judgment as in case of nonsuit. C. S., 567.

This action was brought under C. S., 2445, as amended by chapter 100 of the Public Laws 1923. The plaintiff obtained before the clerk a judgment by default final against the defendants. Upon proper notice the judgment was set aside. A similar judgment was held to be irregular in *Jeffries v. Aaron,* 120 N. C., 167. The contention of defendants was to the effect that the judgment should have been by default and inquiry, as the complaint, although verified, did not allege an account stated but the action was an open account for goods sold and delivered. The court below so held with defendants and in this we think there was no error. See C. S., 593, 595, 596, 597.

It was held in *Witt v. Long,* 93 N. C., p. 388: A judgment by default final is irregular in an action on an open account for goods sold and delivered, where there is no express contract alleged in the complaint, but the plaintiffs only seek to recover on the implied contract the reasonable value of their goods. In such case, the judgment should be by default and inquiry. *Bostwick v. R. R.,* 179 N. C., 485; *Brooks v. White,* 187 N. C., 656; *Baker v. Corey, ante,* 299.

If the verified complaint alleges a breach of an express promise to pay absolutely a definite sum of money particularly specified for a valuable consideration, the judgment by default final is proper. *Hartman & Co. v. Farrior,* 95 N. C., 177; *Scott v. Life Asso.,* 137 N. C., 515; *Currie v. Mining Co.,* 157 N. C., 209; *Hyatt v. Clark,* 169 N. C., 178; *Miller v. Smith,* 169 N. C., 210; *Montague v. Lumpkins,* 178 N. C., 270.

When an account is rendered, a failure to object to it within a reasonable time will be regarded as an admission of its correctness by the party. *Davis v. Stephenson,* 149 N. C., 113.

The defendants, to have a judgment set aside for irregularity, for the cause above stated, must show a meritorious defense. *Jeffries v. Aaron,* 120 N. C., 167; *Fowler v. Fowler,* 190 N. C., 536. This was shown in this action.

The next question is the application of payments. The principle is thus stated in *Stone v. Rich,* 160 N. C., at pp. 163-4: "There is no rule in the law better settled than the one in regard to the application of payments: (1) A debtor owing two or more debts to the same creditor, and making a payment, may, at the time, direct its application to any one of the debts. The right is lost if the particular application is not directed at the time of the payment. (2) If the debtor fails to make the application at the time of the payment, the right to apply it belongs to the creditor. (3) If neither debtor nor creditor makes it, the law will apply it to the unsecured debt or the one for which the creditor's security is most precarious, or, as sometimes expressed, according to its own view of the intrinsic justice and equity of the case," citing numerous authorities.

"In the absence of an application of a payment by either the debtor or creditor, the law will apply it to the unsecured debt, or the one for which the security is most precarious or according to its own view of intrinsic justice and equity. *Stone Co. v. Rich, supra; Hempfield R. Co. v. Thornburg,* 1 W. Va., 261." 8 S. E. Digest, N. C. ed., p. 10155.

"A creditor receiving voluntary payment without instructions as to application thereof may apply it to any claim he chooses." *Austin v. Southern Home Bldg. & Loan Assn.,* 122 Ga., 439, 50 S. E., 382; *Stone Co. v. Rich, supra; Hempfield R. Co. v. Thornburg, supra.* 8 S. E. Digest, p. 10152. The charge of the court below was correct.

The last material question on the record is the refusal of the court below to allow defendant's motion to reduce the amount of the verdict to the actual amount of the bond given, $1,165.

Public Laws 1923, chapter 100, sections 1 and 2, are as follows: (1) "That section two thousand four hundred and forty-five of the Consolidated Statutes be amended by adding thereto the following: Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section, *shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given.*" (Italics ours.)

(2) "Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the county in which the building, road or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action upon the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within twelve months from the bringing of the action, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant *pro rata* of the amount of the recovery. *The surety on such bond may pay into court for distribution among the claimants the full amount of his liability, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved of further liability.*" (Italics ours.)

Hoke, J., in *Warner v. Halyburton*, 187 N. C., at p. 415, construing C. S., 2445, says: "The contract in question provides that the construction company shall build and complete the schoolhouse at Apex, N. C., providing all the materials, etc., therefor at their own expense, at the price of $58,083. There is no stipulation in the agreement that the contractor shall pay either the laborers or the material men, and a perusal of the instruments throughout will show that they are merely designed to secure the satisfactory and proper completion of a turnkey job, so far as the municipality is concerned, and that no interest *ultra* is provided for or contemplated. The case presented comes directly within the decisions of the Court in *McCausland v. Construction Co.,* 172 N. C., 708, and *Mfg. Co. v. Andrews,* 165 N. C., 285." In *Brick Co. v. Gentry,* 191 N. C., 636, the *Warner case, supra,* is cited and the whole matter is thoroughly discussed. See *Harrison v. Transit Co.,* 192 N. C., p. 545.

The General Assembly of 1923, chapter 100, Public Laws, *supra,* amended C. S., 2445, as we construe the matter, to meet the decisions in the above cases, so as to protect the laborers and materialmen, where the bond does not make provisions to pay them.

In *Hughes v. Lassiter,* 193 N. C., at p. 657, it is said: "It is well settled in this jurisdiction that all contracts subsequently made and entered into are interpreted in reference to the existing law pertinent to the subject. The laws in force become a part of the contract as if they were expressly incorporated. *House v. Parker,* 181 N. C., 40; *Johnson v. Yates,* 183 N. C., 24; *Douglas v. Rhodes,* 188 N. C., 585; *Ryan v. Reynolds,* 190 N. C., 563; *Humphrey v. Stephens,* 191 N. C., 101; *Electric Co. v. Deposit Co., ibid.,* 653."

The question of the amount of the bond did not arise in the cases cited and we are of the opinion the amendment to C. S., 2445, *supra,* was passed to meet these decisions.

C. S., 2445, provided a scale for the amount of the bond to be taken in reference to the contract price, and provides that any of the public agencies mentioned that fails to require the bond as fixed by the statutes is guilty of a misdemeanor. We think that this provision, making it a misdemeanor, is still applicable where the amount of bond required by the public agencies, in accordance with the terms of the statute, is not taken. We cannot hold, as we construe the amendment to the statute to meet the decisions of this Court, that the Legislature intended to deal with the matter of the bond to be taken.

It is held in *Robinson Mfg. Co. v. Blaylock,* 192 N. C., p. 407, in a carefully written opinion by *Stacy, C. J.,* at p. 409: "On 28 April, 1926, the surety paid into court the sum of $4,576.00, the full penalty of its bond (unless it be liable for interest thereon), for distribution *pro rata* among the laborers and materialmen as provided by the statute. . . . (p. 411) It is stipulated in the present bond that '*this bond is subject to the provisions of section 2445 of the Revised Statutes of North Carolina and amendments thereto.*' (Italics ours.) The right of the laborers and materialmen to recover on said bond is conceded, and it has been paid in full. The contest is over the retained percentages withheld under the contract and now in the hands of the owner. . . . (pp. 415-16) The apparent hardship of the case arises from the fact that the bond given by the contractor and taken by the board of education for the benefit of the laborers and materialmen is not large enough, or it is not as large as contemplated by the statute, but this is a deficiency which the courts are not able to supply. *Nolan Co. v. Trustees, supra* (190 N. C., 250). His Honor correctly held that the liability of the American Surety Company on its bond would not exceed the maximum penal sum of $4,579.00, which has been paid into court. *S. v. Martin,* 188 N. C., 119."

The latter part of section 2, Public Laws 1923, chapter 100, *supra,* would indicate "the penalty named in the bond" was the limit of liability, and this was the construction in *Robinson Mfg. Co. v. Blaylock, supra.*

It is a matter of common knowledge that premiums are based on the amount of the liability as written in the bond. Without some positive declaration of the legislative intent, so that bond companies can be governed accordingly, we cannot hold the bond should be increased over the contract stipulation. Any other view, we think, would do an injustice. We think that the judgment should be reduced to the amount of the bond, $1,165.00. See *Robinson Mfg. Co. v. Blaylock, supra.*

For the reasons given the assignment of error in the court below, made by defendant, cannot be sustained, except that the judgment should be reduced to the amount of the bond given and interest as stated.

Modified and affirmed.

STAR FURNITURE COMPANY, INC., v. CAROLINA & NORTHWESTERN RAILWAY CO., INC.

(Filed 16 May, 1928.)

1. **Pleadings—Demurrer—Grounds Therefor—Misjoinder of Parties and Causes of Action.**

   To sustain a demurrer to the complaint there must be a misjoinder of parties and causes of action, and a misjoinder of an unnecessary party is alone insufficient to have the action dismissed.

2. **Appeal and Error—Review—Questions Presented on Appeal from Judgment Overruling Demurrer.**

   Upon an appeal from a judgment overruling a demurrer to the complaint the merits of the controversy are not presented, and the court will determine only whether a cause of action has been sufficiently alleged.

3. **Carriers—Carriers of Goods—Liability for Loss or Injury to Goods—Parties Entitled to Sue Railroad—Bill of Lading—Demurrer.**

   Under the Carmack Amendment to the U. S. statute, a carrier is liable to the lawful holder of a receipt or bill of lading in interstate commerce, or to any party entitled to recover thereon, for the full, actual loss or damage to the shipment, and in the consignor's action to recover for a shipment destroyed while in the carrier's possession, and it also appears in the complaint that the plaintiff had given the initial carrier notice of the loss, a demurrer on the ground that the consignee had been made a party plaintiff and that the title to the shipment vested in him upon the consignor's receiving the bill of lading, and that it is not alleged that the latter had also given the required notice to the carrier, is bad; and as to whether such notice is required under a uniform bill of lading is not presented on the appeal of defendant from judgment overruling the demurrer.

APPEAL by defendant from *Schenck, J.*, at November Term, 1927, of CALDWELL.

Civil action to recover damages for an alleged breach of a contract of carriage.

This action was instituted 21 May, 1926, by the Star Furniture Company, Inc., to recover the value of a carload of furniture, delivered by it to the defendant on 13 July, 1925, at Lenoir, N. C., evidenced by bill of lading, for shipment and delivery to one S. Strassman of Philadelphia, Pa., which said furniture was destroyed by fire before leaving the point of origin and while on the defendant's sidetrack.

Defendant answered, denied liability, alleged that the fire which destroyed the furniture in question, before being moved from the industrial track, constructed primarily for plaintiff's benefit, originated in one of the buildings of plaintiff's furniture factory, through the negligence of plaintiff's agents, and the defendant set up a counterclaim for loss of the car and damage to its track.

Thereafter, by leave of court, S. Strassman was joined as a party plaintiff; an amended complaint was filed, to which the defendant demurred.

The material allegations of the amended complaint, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. That plaintiff, Star Furniture Company, consignor of the shipment of furniture, is a corporation with its principal place of business at Lenoir, N. C., and that S. Strassman, consignee of the shipment of furniture, is a resident of the city of Philadelphia, Pa.

2. That the defendant, Carolina & Northwestern Railway Company, Inc., is a common carrier by railroad, engaged as such in interstate commerce and transportation.

3. That on 13 July, 1925, the defendant, in its capacity as a common carrier and in consideration of the payment of the usual rate of freight, received from the Star Furniture Company at Lenoir, N. C., a carload of furniture for shipment and delivery to S. Strassman, the consignee thereof, at Philadelphia, Pa.

4. That upon the delivery of the goods aforementioned, to the defendant, a bill of lading for same was executed by defendant and by it de-

livered to plaintiff corporation, evidencing receipt and acceptance of said carload of furniture for transportation and delivery to the consignee therein named.

5. That subsequent to the receipt and acceptance of said furniture and the issuance of the bill of lading therefor, the same was destroyed by fire, without negligence on the part of plaintiffs or either of them, which said furniture was reasonably worth $2,390.00.

6. That within six months after delivery of said furniture to the defendant, the Star Furniture Company, on a form provided by the defendant for the purpose, made and presented to the defendants at the point of origin, as required by the bill of lading, a written claim for the loss of said property and the value thereof, and demanded payment of said claim, which was refused by the defendant "upon the alleged ground that it was not legally liable for the loss of said carload of furniture."

The defendant demurred to this amended complaint on the following grounds:

"1. There is a misjoinder of parties plaintiff to said suit for the reason there cannot be in this case a joint cause of action existing in both the consignor and consignee, there being no allegation that one party was the agent of the other.

"2. In that the complaint does not set forth facts sufficient to constitute a cause of action on the following grounds:

"(a) No right of action exists in favor of the Star Furniture Company for the reason that it is consignor of the freight in question, and title passed to the consignee upon the issuance of the bill of lading, and the Star Furniture Company had no title thereto after the issuance of said bill of lading.

"(b) Plaintiff, S. Strassman, has no right or cause of action as the complaint shows on its face that no claim was made and presented against said defendant for the loss of the said property, or the value thereof, by the said plaintiff S. Strassman within six (6) months after delivery of the furniture to the defendant in accordance with the terms of the bill of lading."

From a judgment overruling the demurrer, the defendant appeals, assigning error.

J. T. Pritchett and W. A. Self for plaintiff.
John A. Marion and Mark Squires for defendant.

Stacy, C. J., after stating the case: It should be observed, at the outset, that we are not dealing with the merits of the controversy, but with the sufficiency of the allegations of the complaint. *Ballinger v. Thomas, ante,* 517. The case is here on demurrer, restricted to the two grounds specified and designated therein. C. S., 512.

The demurrer was properly overruled on the first ground, *i. e.,* of an alleged misjoinder of parties. It is no "defect of parties" to join unnecessary parties. *Abbott v. Hancock,* 123 N. C., 99, 31 S. E., 368; C. S., 511. Furthermore, it is only when there is a misjoinder, both of parties and of causes of action, and a demurrer is interposed upon this ground, that the demurrer should be sustained and the action dismissed. *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664.

The demurrer was properly overruled on the second ground also. It does not appear from the *complaint* that claim for loss must be filed by the consignee, or that such claim may not be filed by the consignor. It is provided by the "Carmack Amendment" to the Interstate Commerce Act (set out in full in *Mann v. Transportation Co.,* 176 N. C., 107) that any common carrier, railroad or transportation company, receiving property for transportation in interstate commerce, "shall be liable to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon," for the full actual loss, damage or injury to such property caused by it or any connecting carrier when transported on a through bill of lading, etc. We are not called upon to decide, nor do we decide, upon the present record, whether, under a uniform bill of lading, notice by the consignor will suffice to support an action by the consignee. The complaint alleges that the Star Furniture Company made and presented a written claim against the defendant for the loss of said property, on a form furnished by the defendant for the purpose, and delivered same to the defendant at the point of origin of shipment "as required and provided in the bill of lading." The bill of lading is not made a part of the complaint.

We are not permitted to look beyond the allegations of the complaint, or travel outside the scope of the demurrer, in dealing with the present appeal. *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800.

The question as to whether suit by the consignee, debated on brief, can be maintained, because not brought within the time limited in the contract, is not presented by the demurrer.

Affirmed.

D. A. RENDLEMAN, TRUSTEE OF THE PERPETUAL BUILDING AND LOAN ASSOCIATION, BANKRUPT, v. WILLIAM M. STOESSEL AND WIFE, LEONIE STOESSEL.

(Filed 16 May, 1928.)

1. **Building and Loan Associations—Ultra Vires Acts—Bankruptcy—Federal Judgments—Receivers.**

In an action by the trustee in bankruptcy of a building and loan association to recover the balance due on loans, the question as to any *ultra vires* act of the association, rendering the defendant's obligation void, or as to whether the receiver could maintain his action in the courts of the State, are for the determination of the bankrupt court, and when the proceedings therein are not void upon their face, they will be followed in the State court.

2. **Building and Loan Associations—Relationship of Borrower and Stockholder—Receivers—Bankruptcy.**

Where the borrower from a building and loan association takes out stock, to pay at maturity the debt secured by a mortgage on his building, he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the association; that of stockholder, and that of debtor to the association, and he is not entitled to have his payments made on his shares of stock credited to his debt, as against the claims of the other creditors. C. S., 5180, 5183.

APPEAL by defendants from *Finley, J.,* at November Term, 1927, of ROWAN.

The case was heard on an agreed statement of facts, a summary of which follows:

On 16 September, 1921, the defendants borrowed $1,600 from the Perpetual Building and Loan Association, delivering to said Building and Loan Association a note for $1,600 and a deed of trust securing the note. At the same time and as part of the same transaction, the defendants subscribed to sixteen shares in series 69 and 72 of said Building and Loan Association, agreeing to pay 25 cents per share weekly until the series reached the par value of $100 per share, when defendants agreed to repay said loan, hypothecating the stock as security for the loan. On 1 March, 1926, by mutual consent, the 16 shares in series 69 and 72 of said stock were canceled, defendants made a payment of $200 on the note, and defendants subscribed to 14 shares in series 81 of such stock, substituting and hypothecating said fourteen shares with plaintiff company under the same terms and conditions as the sixteen shares were formerly held. The interest on the note is paid to 1 September, 1926. $91.00 in installments has been paid on the fourteen shares of stock in series 81. On 31 August, 1926, a receiver was appointed for the insolvent Building and Loan Association, and on 7 January, 1927, the association was adjudicated a bankrupt and plaintiff was appointed trustee. Plaintiff, in his capacity as trustee, has possession of the note and mortgage. Defendants have tendered the full amount of the principal and interest due on the note, except $91, which defendants claim as a credit upon said note.

A judgment was signed in the court below, adjudging that defendants are not entitled to credits upon the note for stock payments of $91.00; that plaintiffs recover of defendants the sum of $1,400, together with interest thereon from 1 September, 1926; and that the trustee in the deed of trust be authorized to sell same in accordance with the terms and provisions thereof.

Defendants excepted and appealed.

Rendleman & Rendleman, John M. Robinson and S. E. Vest for plaintiff.

T. G. Furr for defendant.

J. A. Lockhart and H. L. Taylor filed a brief as amici curiæ.

ADAMS, J. We find nothing in the record to impeach the good faith of the parties in seeking an adjudication of the matters in controversy. The brief filed by the *amici curiæ* raises a question as to the validity of the proceedings in bankruptcy and the right of the plaintiff to maintain the action. On 7 January, 1927, the Perpetual Building and Loan Association was adjudged a bankrupt by the District Court of the United States for the Western District of North Carolina, and on 28 March, 1927, D. A. Rendleman was elected trustee. Unless the proceeding is void (and this we cannot hold upon the record before us), the question must be left to determination upon the motion now pending in the District Court. The position that the notes payable and the paid-up stock are void as obligations because *ultra vires* is properly determinable by the referee in bankruptcy, whose duty it is to allow or disallow claims of creditors who assert a right to share in dividends. 2 Remington on Bankruptcy, sec. 611; Bankruptcy Act, secs. 38, 39. We are of opinion that neither this question nor that of the basis on which the final settlement shall be made is necessarily involved in the present appeal. The only assignment of error appearing in the record is an exception to the judgment. The crucial point is whether the defendants, who are subscribers to stock in the bankrupt association and borrowers therefrom to the amount of the stock subscribed, may have the payments which they have made on their stock deducted from the amount borrowed, in an action brought by the trustee to recover judgment on a note given for the loan and to foreclose a deed of trust by which the loan is secured.

It will be noted that the defendants contend that their note should be credited with sums which were paid upon their subscription for stock. In their relation to the association they occupied the two independent capacities of shareholder and debtor. This dual relation is one of the determining factors in the solution of the controversy. It is provided by statute that all serial shareholders of the serial plan shall occupy the same relative position as to debts, losses, and profits, and that upon settlement a borrowing member shall be credited with only the withdrawal value of his shares as fixed by the charter, by-laws, or directors of the association. C. S., 5180, 5183.

In *Meares v. Davis,* 121 N. C., 126, the defendants, borrowing stockholders in an insolvent association, moved the court for an order to require the receivers to pay them $382.27, proceeds derived from a sale of their property. It was admitted that this sum was their *pro rata* proportion of the deficiency of the defaulting association; and upon these facts it was held that to grant the order asked for would be to relieve the defendants from the burden of the defalcation at the expense of their associate corporators. Also in *Williams v. Maxwell,* 123 N. C., 586, it was said that the *pro rata* part of the loss of an insolvent association was to be deducted from payments made by a borrowing member. The principle was adhered to in *Meares v. Development Co.,* 126 N. C., 662, the Court reiterating the conclusion announced in other cases that a stockholder would be made to account for the proportionate part of the loss resulting from the insolvency of the corporation. Several of the cases are reviewed in an opinion written for the Court by *Chief Justice Clark* in *Building & Loan Association v. Blalock,* 160 N. C., 490, in which he said: "The defendant being a corporator, the money he has paid must first be credited in discharge of his *pro rata* share of the losses of the concern just as, in a contrary event, he would have been credited with his share of the profits, and after payment of such losses the mortgaged property as well as himself is liable for the assessments necessary to mature his stock." Payments on stock were not payments on the note, and upon the facts agreed they did not operate as a *pro tanto* extinguishment of the mortgage. See *Coltrane v. Blake,* 113 Fed., 785. Judgment

Affirmed.

STATE v. GUS GEURUKUS.

(Filed 16 May, 1928.)

Criminal Law—Instructions—Objections and Exceptions.

A *lapsus linguæ* of the judge in stating his recollection of what witnesses testified to a fact in evidence should be brought to the attention of the judge at the time, and when this is not done it will not be considered on appeal.

APPEAL from *Webb, J.,* and a jury, at November Term, 1927, of MECKLENBURG. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. D. McCall for defendant.

PER CURIAM. The defendant was convicted, under a bill of indictment, charging him with criminal abortion, an offense against C. S., 4226. The State's evidence made out all the material elements of the offense and was sufficient to be submitted to the jury.

The only assignment of error relied on by defendant in this Court is expressed in defendant's brief, as follows: "Question involved—court's erroneous instruction as to testimony of John Henry Robinson, who didn't testify." While recapitulating the evidence of the State, the court said: "An old colored man stated that he got some medicine for this defendant. You will recollect what he stated about it." As a matter of fact, this old colored man was not put upon the stand, but there was direct evidence that he did procure the medicine at the instigation of the defendant and the prosecuting witness; the defendant, however, denying that he had anything to do with it. This mistake, *lapsus linguæ,* should have been corrected at the time that the court made it. It is a mere inadvertent slip which occurred in stating the evidence, which frequently occurs. In order that an exception should be sustained in this Court for such inadvertence, it must be brought to the attention of the court below at the time it is made. Consequently, it cannot be relied upon here. Defendant's counsel in his brief states that he was not in the courthouse at the time that this was done. This cannot in any way affect the rule so often adhered to in this Court. The court below subsequently, however, told the jury: "You will recollect all of the evidence, gentlemen. I will not have the stenographer read all of her notes, but if you disagree, I will have the stenographer read her notes, or a part of them, of any witness who has been examined. . . . While her notes will not bind you, they will refresh your memory." This, of course, puts the question of who testified, and what they testified to, up to the jury. *S. v. Sinodis,* 189 N. C., 565; *S. v. Johnson,* 193 N. C., 701.

No error.

MRS. MARY J. PARKER v. MECKLENBURG REALTY & INSURANCE COMPANY ET AL.

(Filed 23 May, 1928.)

1. Pleadings—Complaint—Amendment—New Action.

An amendment to a complaint in an action to set aside a conveyance of land for fraud is not substantially changed by an amendment allowed the plaintiff in the discretion of the trial court, to allege damages sustained and provable as directly resulting therefrom. C. S., 547.

2. Same—Notice—Absence of Attorney.

Notice of a motion to amend the complaint in a pending cause at term is not required to be given the defendant, and the absence of the defendant's attorneys from court at the time is not a good ground for exception to the allowance of the motion by the judge presiding.

3. Attorney and Client—Attorney's Fees—Fees Not a Part of Costs.

Attorney's fees and the personal expenses of an attorney in the litigation is not an element of damages recoverable by the plaintiff in his suit to set aside a conveyance of land for fraud.

CIVIL ACTION, before *Harding, J.*, at October Term, 1927, of MECKLENBURG.

The facts are reported at length in the former appeal appearing in 192 N. C., p. 798. The plaintiff instituted an action against Thomas and Waggoner, partners, trading as the Mecklenburg Realty and Insurance Company, and others, alleging that the defendants devised a plan or scheme to cheat and defraud her and in pursuance of such scheme induced her to sign a note for $2,600 and a deed of trust upon her property securing said note, representing to her at the time that said deed of trust and note was a deed for her land which she was selling for $3,500. The present case was restricted to issues arising between the plaintiff and the defendants Thomas and Waggoner. The original complaint, after setting out the allegations of fraud, contained a prayer for relief to the effect that said note for the sum of $2,600 and deed of trust securing the same be declared null and void and stricken from the record in the office of the register of deeds of Mecklenburg County and for "such other and further relief as to the court may seem just and proper." Thomas and Waggoner did not appear at the present trial. At the trial the plaintiff, by permission of the court, amended the original complaint as follows: "By reason of the acts and conduct of the defendants as aforesaid plaintiff has been damaged in the sum of $2,600 together with interest thereon from 12 December, 1924. Wherefore, plaintiff prays judgment against defendant in the sum of $2,600 together with interest thereon from 12 December, 1924, until paid, the costs of this action to be taxed by the clerk, and that the plaintiff have such other and further relief as to the court may seem just and proper."

Upon the complaint as amended the following issues were submitted to the jury:

1. Was the execution and delivery by the plaintiff of the note and deed of trust described in the complaint procured by fraud and misrepresentation of the defendants, Thomas and Waggoner, as alleged in the complaint?

2. What amount of damages, if any, is plaintiff entitled to recover of defendants, A. R. Thomas and L. A. Waggoner, on account of said fraud?

The jury answered the first issue yes, and the second issue $1,543.12.

J. C. Newell and H. L. Taylor for plaintiff.
Cansler & Cansler for Merchants and Farmers Bank.
J. F. Flowers for defendants, Waggoner and Thomas.

BROGDEN, J. Two questions of law are presented, to wit:

1. In an action to set aside a deed of trust upon the ground of fraudulent representation in the procurement thereof as a cloud upon title, is an amendment to the complaint at the trial, permitting the recovery of damages for the alleged fraud, within the power of the court?

2. Are attorneys' fees incurred in setting aside such an instrument upon the ground of fraud a proper element of damages?

The answer to the first proposition depends upon whether or not the amendment permitted by the court wrought such a change in the pleadings as to constitute substantially a new action or a cause of action wholly different from that set out in the original complaint. The statute C. S., 547, permits a trial judge in the exercise of his discretion to allow amendments in cases of this kind "when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceeding to the fact proved." The defendants, however, attack the amendment upon two grounds: First, that they did not attend the trial and had no notice of the amendment. Second, that the amendment substantially changed the cause of action set out in the original complaint.

The first ground of attack is untenable. This Court held in *Hardware Co. v. Banking Co.*, 169 N. C., 744, 86 S. E., 706: "It is well settled that no notice of a motion is required to be given to the adversary when the motion is made at a term when the cause stands for trial. Parties to actions are supposed to take notice of any motion that may be made in a cause when it is made during the terms of the court."

The second ground of attack is also untenable. "It is well settled that the court cannot, except by consent, allow an amendment which changes the pleadings so as to make substantially a new action, but it is also settled that an amendment which only adds to the original cause of action is not of this nature and may be allowed in the sound discretion of the trial judge." *Brown, J.*, in *Hardware Co. v. Banking Co., supra. Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501; *Currie v. Malloy,* 185 N. C., 206, 116 S. E., 564.

The cause of action stated in the original complaint was the fraudulent procurement of a note and deed of trust for $2,600. From the proceeds of said note and deed of trust the sum of $1,805.48 was paid for the benefit of plaintiff, but the balance amounting to $794.52 was neither paid to the plaintiff nor expended for her benefit. Certainly if a fraud was committed, she had a right to have the note and deed of trust in controversy declared null and void, and also to recover any damage which she suffered by reason of the fraud practiced upon her by the defendants. The amendment to the complaint, therefore, gave the plaintiff another legal ground for the collection of the same demand. The amendment did not substantially change the cause of action or set up a wholly different cause of action, nor change the subject-matter of the action or deprive the defendants of any available offense or interfere with any vested right.

We hold therefore that the amendment was within the discretion of the trial judge.

The second question relates to the action of the trial court in permitting the jury to consider as an element of damages attorneys' fees and traveling expenses of attorneys for the plaintiff. The right to recover attorneys' fees is discussed in the following cases in this State: *Hyman v. Devereux,* 65 N. C., 588; *Patterson v. Miller,* 72 N. C., 516; *Mordecai v. Devereux,* 74 N. C., 673; *Turner v. Boger,* 126 N. C., 302; *Bank v. Land Co.,* 128 N. C., 193, 38 S. E., 813; *Clark v. Lumber Co.,* 158 N. C., 139, 73 S. E., 793; *Donlan v. Trust Co.,* 139 N. C., 212, 51 S. E., 924; *Midgett v. Vann,* 158 N. C., 128, 73 S. E., 801; *Shute v. Shute,* 180 N. C., 389, 104 S. E., 764; *Roe v. Journigan,* 181 N. C., 183, 106 S. E., 562; *Byrd v. Casualty Co.,* 184 N. C., 226, 114 S. E., 172; *Ragan v. Ragan,* 186 N. C., 461, 119 S. E., 882.

The general rule is stated in *Ragan v. Ragan, supra:* "Attorneys' fees are not recoverable by successful litigants in this State, as such are not regarded as a part of the court costs." This rule has been applied to suits on promissory notes, breach of contract, personal injury and injunctions. The reason for the rule is well stated in *Stringfield v. Hirsch,* 94 Tenn., 425, 29 S. W., p. 609. "We think that the analogies of the law, as well as the soundest public policy, demand that counsel fees, in suits upon contracts, or for damages for torts, or upon attachments or injunctions, should not be regarded as a proper element of damages, even where they are capable of being apportioned so as to show the amount incurred for the attachments and injunctions as separate and distinct from the other services necessary in the case. It is not sound public policy to place a penalty on the right to litigate; that the defeated party must pay the fees of counsel for his successful opponent in any case, and, especially, since it throws wide the doors of temptation for the opposing party, and his counsel, to swell the fees to undue proportions," etc. *Gordon v. Ky. Midland Coal Co.,* 278 S. W., 68; *Java Cocoanut Oil Co. v. Fidelity & Deposit Co.,* 300 Fed., 302; *Winkler v. Roeder,* 8 A. M. St. Reports, 155 (fully annotated).

The trial court erred in submitting to the jury as elements of damage, counsel fees and personal expenses of counsel, and for such error a new trial is awarded upon the issue of damages only.

Partial new trial.

JOSEPH H. BROWN v. BREVARD AUTO SERVICE COMPANY, A CORPORATION, J. NEELY AND TRANSYLVANIA CASUALTY INSURANCE COMPANY, A CORPORATION.

(Filed 23 May, 1928.)

1. **Constitutional Law—Obligation of Contracts—Change of Procedure Does Not Impair Obligation of Contract—Retrospective Laws—Bus Lines.**

The statute of 1927, amending the Public Laws of 1925, prohibiting the joinder of the assurer in an action against the assured, relates to the remedy, and its enforcement does not impair the obligations of a contract of indemnity.

2. **Venue—Residence of Parties—Nonresident Plaintiff and Resident Defendant.**

Where a nonresident plaintiff brings action against a corporation existing under the laws of this State, with the joinder of a resident defendant, and the venue of the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, C. S., 469, and the action is removable thereto upon motion duly made by the resident defendant.

APPEAL by defendants from *Moore, J.,* from order rendered on 30 November, 1927, of HENDERSON. Reversed.

Ewbank, Whitmire & Weeks for plaintiff.
R. R. Williams for defendants.

CLARKSON, J. This is an action for actionable negligence instituted by plaintiff, a resident of South Carolina, against Brevard Auto Service Company, a corporation organized and existing under the laws of North Carolina, that operated a public motor bus line between Brevard and Hendersonville, N. C. It is alleged that the injury complained of, on which this action is based, took place on 24 August, 1926. That the defendant, J. Neely, was the agent of his codefendant, Brevard Auto Service Company, and the driver of the motor bus at the time of the injury complained of. That on 14 March, 1925, under authority and in compliance with chapter 50, Public Laws 1925, the Transylvania Casualty Insurance Company, a corporation organized and existing under the laws of Kentucky, gave bond in the sum of $5,000 for the protection of the public against injuries caused by the negligent operation of the motor buses owned and operated by Brevard Auto Service Company, which bond was in full force and effect at the time of the injury complained of, for which this action is instituted. The bond covered the motor bus of Brevard Auto Service Company, the defendant, which it is alleged was negligently being operated by J. Neely, its agent and codefendant, at the time plaintiff was injured.

The summons in the action was issued on 31 August, 1927, and duly served on defendants, and the complaint sworn to and filed in apt time.

The defendants, in apt time, made a motion to remove the action from Henderson County to Transylvania County. The plaintiff, Joseph H. Brown, is a resident of South Carolina; the defendant, Brevard Auto Service Company, is a corporation organized and existing under the laws of North Carolina; the defendant, J. Neely, is a resident of Transylvania County, and the Transylvania Casualty Insurance Company is a corporation organized and existing under the laws of Kentucky, and has been duly authorized and licensed to do business in North Carolina.

Plaintiff in his brief says: "In view of the decision in the case of *Palmer v. Lowe et al.*, as reported in 194 N. C., p. 703, which has been handed down since this matter was heard by the Superior Court judge, the appellee is no longer able to resist the motion of the appellants to remove this case to Transylvania County for trial." The law in the above respect is settled, as the plaintiff admits.

The several defendants also demurred for misjoinder of both parties and causes of action. The demurrers were overruled. In this we think the court below erred.

Public Laws 1925, chap. 50, sec. 3, 6(g), was construed in the case of *Harrison v. Transit Co.*, 192 N. C., p. 545, and it was held that the language of the statute allowed both assurer and assured to be sued jointly in the same action. It is alleged that the bond of the Transylvania Casualty Insurance Company, which was given in conformity with said act of 1925, was executed 14 March, 1925. That the actionable negligence, for which this suit was instituted, occurred on 24 August, 1926. This action was commenced on 31 August, 1927. The Public Laws 1927, chap. 136, sec. 6, to meet the *Harrison case, supra,* prohibited the joinder of the assurer and the assured. See *Williams v. Motor Lines, post,* 682. Said Public Laws 1927, chap. 136, sec. 20, is as follows: "That all acts or parts of acts in conflict with or inconsistent herewith are hereby repealed to the extent of said conflict or inconsistency; but nothing herein contained shall be construed to relieve any motor vehicle carrier, as herein defined, from any regulation otherwise imposed by law or lawful authority; neither shall this act be construed to affect any obligation arising under duty imposed by nor right of action accruing under chapter fifty, Public Laws of one thousand nine hundred and twenty-five, and amendments thereto (sec. 22). That this act shall be in full force and effect from and after June thirtieth, one thousand nine hundred and twenty-seven."

Thus the act of 1927, preserved obligations arising from duties imposed and the right to bring a suit for a cause of action accruing under said act of 1925. Hence the act of 1927, affected or operated upon the remedy only by providing a different method for enforcing the right of action. Moreover the plaintiff having brought his suit after the act of 1927 became effective the remedy as therein prescribed must control the action. The principle of law applicable is thus stated in *Martin v. Vanlaningham,* 189 N. C., 656, 127 S. E., 695: "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions."

Applying this principle to the facts disclosed by the record, we hold that the court below erred in overruling the demurrer and that the order of removal was properly granted.

Reversed.

HARDAWAY CONTRACTING COMPANY v. WESTERN CAROLINA POWER COMPANY.

(Filed 23 May, 1928.)

1. **Reference—Report and Findings—Effect and Status of Report—Exceptions.**

   Construing C. S., 578 and C. S., 579 together as being in *pari materia:* it is *Held,* a party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee.

2. Appeal and Error — Review — Interlocutory Proceedings—Premature Appeals—Dismissal.

An appeal from the adverse ruling of the trial judge on a motion to strike out exceptions to a referee's report, made by the party on whose motion the reference was made, is from an interlocutory order and premature, and will be dismissed on appeal.

CLARKSON and BROGDEN, J.J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Harding, J.*, at January Special Term, 1928, of MECKLENBURG.

Civil action by plaintiff, Contracting Company, to recover of defendant damages for an alleged breach of contract for the construction of an hydro-electric development, situate in Burke and McDowell counties and known as the Bridgewater Development.

Plaintiff declares upon a written contract, sets up numerous breaches thereof on the part of the defendant, and fixes its damages at more than a million dollars. Defendant answers, denies liability, pleads a number of counterclaims, and asks for judgment against the plaintiff in a large sum.

At the January Special Term, 1921, Mecklenburg Superior Court, it appearing that the taking of an account between the parties would be necessary before judgment could be entered or carried into effect, on motion of the defendant, and over objection and reservation of the right to a jury trial on the part of plaintiff, the cause was referred under the statute to Hon. J. E. Swain, who found the facts and reported same, together with his conclusions of law, to the court, holding that the plaintiff was entitled to judgment against the defendant in the sum of $325,727.53, after making all proper deductions for counterclaims, with interest on said amount from 22 March, 1919.

The defendant, in apt time, filed 56 exceptions to the findings of fact made by the referee, and 83 exceptions to his conclusions of law.

Many of the defendant's exceptions to the referee's findings of fact appear to have been made upon the alleged ground that said findings are not only contrary to the weight of the evidence, but also, in many instances, because of a lack of sufficient evidence to sustain such findings; in some instances because contrary to facts alleged and admitted in the pleadings; in others for that they are at variance with the terms of the contract or other written instruments binding on the parties; and in others because of the referee's failure to find certain facts, etc. In addition, the defendant moved that the cause be recommitted to the referee for further hearing and reconsideration.

The plaintiff also filed exceptions to the report of the referee and demanded a jury trial, both upon its own exceptions and those of the defendant taken to the findings of fact by the referee, as it had preserved its right to do at the time of the original reference. *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419.

At the January Special Term, 1928, Mecklenburg Superior Court, after the defendant's motion to recommit the case to the referee had been denied, or overruled, the plaintiff insisted upon its motion, previously filed in writing, to strike out the defendant's exceptions to the findings of fact by the referee, for that, the reference, which was to report the facts, was made at the instance of the defendant, and, under the statute, C. S., 579, "when the reference is to report the facts, the report has the effect of a special verdict." This motion was overruled; whereupon the plaintiff excepted and appealed to the Supreme Court, assigning said ruling as error.

E. W. Price, Taliaferro & Clarkson, T. D. McCall and Manning & Manning for plaintiff.

E. T. Cansler, C. W. Tillett, T. C. Guthrie, Plummer Stewart, R. S. Hutchison and W. S. O'B. Robinson, Jr., for defendant.

STACY, C. J., after stating the facts: It is the position of the plaintiff that as the reference was to report the facts, under C. S., 579, such report has the effect of a special verdict, and the defendant, having asked for the reference, is bound thereby and cannot now except to any finding of fact made by the referee, save upon the ground that there is no evidence to support it. *Davis v. Schwartz,* 155 U. S., 631, 39 L. Ed., 289; 23 R. C. L., 299.

To adopt this construction, we apprehend, would be to overlook the section immediately preceding, C. S., 578, which provides that "either party, during the term or upon ten days notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it, in whole or in part, and no judgment may be entered on any reference except by order of the judge." And our decisions are to the effect that, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of a referee. *S. v. Jackson,* 183 N. C., 695, 110 S. E., 593; *Vaughan v. Lewellyn,* 94 N. C., 472.

Indeed, the view now urged by the plaintiff was considered by the court in the case of *Lawrence v. Hyman,* 79 N. C., 209, and disposed of as follows: "It was insisted here that the reference having been made under The Code, the finding of the referee was in the nature of a special verdict, and is conclusive of the facts, and not reviewable on exceptions.

We consider this question settled adversely to this contention, by the cases of *Green v. Castlebury,* 70 N. C., 20, and *Armfield v. Brown,* 70 N. C., 27."

There was no error in the ruling from which the plaintiff appeals. But the appeal is premature, being, as it is, from an interlocutory order, and for this reason it must be dismissed. We have thought it better, however, to express an opinion on the question of procedure sought to be presented, as such may be helpful at the present time, a course pursued in a number of cases and permissible under our decisions. *Sneed v. Highway Com.,* 194 N. C., 46, 138 S. E., 350; *S. v. Carroll,* 194 N. C., 37, 138 S. E., 339; *Corp. Com. v. Mfg. Co.,* 185 N. C., 17, 116 S. E., 178.

Appeal dismissed.

CLARKSON and BROGDEN, J.J., took no part in the consideration or decision of this case.

R. O. HIGGINS v. W. S. HOUGH.

(Filed 23 May, 1928.)

Deeds and Conveyances — Construction and Operation — Restrictions— Equity.

A restriction in a deed that only one dwelling-house be erected on the lot of land conveyed will not be enforced when business and apartment houses have been erected in the locality, and the nature of the development has changed so that the value of the land would be greatly depreciated by the restriction, thus rendering the enforcement of the restriction inequitable or oppressive. *Starkey v. Gardner*, 194 N. C., 74, cited and applied.

CIVIL ACTION before *Harding, J.,* at April Special Term, 1928, of MECKLENBURG.

On 22 July, 1922, the Charlotte Consolidated Construction Company, conveyed a lot on East Morehead and Oriole avenues or streets to Z. V. Kendrick and wife. The land was divided into two lots. The plaintiff owns lot B fronting on Oriole Avenue and the defendant owns lot A at the intersection of Oriole Avenue and East Morehead Street. Both the plaintiff and the defendant derived the title from Kendrick. The deeds from Kendrick to the plaintiff and defendant contained among others the following restrictions: "The lots of land hereby conveyed shall be used for residential purposes only and not otherwise, and there shall not at any one time be more than one residence or dwelling-house on any one lot," etc. The defendant proposes to erect on his lot an apartment house several stories in height. Whereupon the plaintiff instituted the present action to restrain the defendant from so doing upon the ground that the construction of an apartment house would violate the restrictions contained in the deed. The defendant contended that the restrictions were not enforceable because the character of the community had been changed by the expansion of the city resulting in a fundamental change in the essential character of the property referred to.

The controversy was submitted to the trial judge who found that the restrictions had been violated in many instances set out in his findings and that in the development there were gas stations, a woman's club building, grocery stores, a large laundry building, a market, and apartment houses, one large apartment house having been erected just across the street in front of the property in controversy and another contemplated on Oriole Street.

After setting out the various violations of the restrictions the court further finds as follows: "The court further finds as a fact that the character of the community has been changed by the expansion of the city and the spread of industry and other causes resulting in a substantial subversion or fundamental change in the essential character of the property herein referred to. That changed conditions resulting from the natural growth of the city bringing industry, traffic and apartment houses, clubs, mosques, and churches into such close proximity to the restricted area or property herein described as to render it undesirable for the purpose to which it is restricted. That violations of the restrictions have been so general as to indicate and in fact do indicate the purpose and intention on the part of the residents of the community to abandon the general scheme or purpose in this immediate section. . . . The court further finds as a fact that it is inequitable and unjust to require the enforcement of the restrictions and that it is detrimental and injurious to the market value of the property, and if said restrictions are permitted to continue, that it will retard the advancement and upbuilding of the property for the purposes for which it can be best used."

From the judgment so rendered plaintiff appealed.

Fred B. Helms for plaintiff.
R. A. Wellons for defendant.

BROGDEN, J. There is no allegation and no finding of fact to the effect that the property in controversy was a part of a general plan or scheme. The trial judge found as a fact that by reason of the growth and expansion of the city the essential nature and character of the property has been changed. The record discloses ample evidence to support the findings of the trial judge. These findings of fact bring the case squarely within the principle announced by this Court in *Starkey v. Gardner,* 194 N. C., 74, 138 S. E., 408. In that case it was said: "The weight of authority is to the effect that if substantial, radical and fundamental changes have taken place in a development protected by restrictive covenants that courts of equity will not enforce the restriction. The underlying reason is, we apprehend, that such changes destroy the uniformity of the plan and the equal protection of the restriction."

The authorities upon the subject are set out in the *Starkey case* and we deem it unnecessary to repeat them here.

Affirmed.

BESSIE MAY BUCKNER v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 23 May, 1928.)

1. **Railroad—Operation—Accidents to Trains—Sufficiency of Evidence of Negligence—Nonsuit.**

   Evidence tending to show that the plaintiff was a passenger on defendant's train, and was injured by the negligence of defendant's crew in leaving the car in which plaintiff was riding on the track without having the brakes on, and that the car started rolling down grade, and that the plaintiff jumped from the car to save herself from imminent peril, is sufficient to sustain a verdict in her favor.

2. **Evidence—Expert Testimony—Competency of Testimony in Explanation.**

   Where an expert witness testifies in answer to a hypothetical question that he had an opinion as to the cause of the injury in suit, but that this opinion was not satisfactory to himself, and then in answer to a question asked him by the court testifies: "If I should have to express an opinion, I should naturally think that the injury she sustained was the cause of her condition thereafter, but this condition could have been caused without such injuries. That is why I say I have no satisfactory opinion as to the cause of her injuries" the reply to the question asked by the court is competent for the purpose of explaining why the witness did not have a satisfactory opinion as to the cause of plaintiff's condition.

3. **Depositions—Requisites—Witnesses—Evidence.**

   Where a witness testifies at the trial, depositions formerly taken of his testimony are incompetent for corroboration when they are not signed by him or the stenographer who transcribed them, nor properly certified to as such, and bearing "no extrinsic evidence of their correctness or accuracy."

APPEAL by defendant from *Moore, J.*, at October Term, 1927, of YANCEY. No error.

Action to recover damages for personal injuries sustained by plaintiff while a passenger of defendant company.

From judgment upon the verdict sustaining plaintiff's allegations of actionable negligence, and assessing damages which plaintiff is entitled to recover of defendant for her injuries, defendant appealed to the Supreme Court.

Watson, Hudgins, Watson & Fouts for plaintiff.

J. J. McLaughlin, Charles Hutchins and Pless & Pless for defendant.

CONNOR, J. On or about 19 April, 1926, plaintiff was a passenger on defendant's train, running from Kona in Mitchell County, to Dellinger, N. C. When the train reached Micaville, the engine was detached from the car in which plaintiff was sitting, leaving the car standing on defendant's track. The train crew left the car, without putting the brakes on. The engine proceeded to a sidetrack, to do some switching. The car in which the plaintiff had been riding immediately began to roll backward, down grade. The railroad track from Kona up to Micaville is up grade and crooked. There is a river on one side of the track, and a mountain on the other. As the car began to roll down the track, plaintiff got up from her seat, and went to the rear of the car. As the car was rolling faster and faster down the track, plaintiff became frightened. She jumped from the rear of the car to the ground, and was injured. She testified that she jumped because she knew about the curves in the track, and because she was apprehensive that the car would leave the track, and plunge into the river. She thought it was safer to jump from the moving car, than to remain in it. She further testified both as to the nature and extent of the injuries which she sustained when she jumped from the rolling car to the ground. She became a mother about three and a half months after she was injured.

The evidence offered by plaintiff tended to sustain her allegations of actionable negligence on the part of the defendant. It was properly submitted to the jury. Defendant's assignments of error on its appeal to this Court from the judgment on the verdict have been carefully considered. They cannot be sustained.

Dr. Robinson, an expert witness on behalf of the plaintiff, testified in corroboration of her testimony as to the nature and extent of her injuries. In answer to a hypothetical question, he testified that upon the facts stated therein, he had an opinion as to the cause of her injuries, but that this opinion was not satisfactory to himself. In response to a question addressed to him by the court, the witness said: "Well, if I should have to express an opinion, I should naturally think that the injury she sustained, when she jumped from defendant's train, was the cause of her condition thereafter, but this condition could have been caused without such injuries. That is why I say I have no satisfactory opinion as to the cause of her injuries." This testimony was admitted over defendant's objection, and subject to its exception. The probative force of the testimony, if any, was very slight. The witness' reply to the question of the court was in effect an explanation of why he did not have a satisfactory opinion as to the cause of plaintiff's condition, as stated in the hypothetical question. It was competent for that purpose. *Riggs v. R. R.,* 188 N. C., 366. It was subject to the tests ordinarily applied to the evidence of witnesses other than experts. *Hedgepeth v. Coleman,* 183 N. C., 309.

Prior to the trial, the deposition of G. E. Elliott, who was the only other passenger on the car at the time plaintiff jumped therefrom, had been taken by defendant at Johnson City, Tennessee. This witness was present at the trial, and testified in behalf of defendant. For the purpose of corroborating the testimony of this witness, defendant offered in evidence several pages of what purported to be his deposition. Upon plaintiff's objection this evidence was excluded. The paper-writing offered as the witness' deposition was not signed by him; there was no evidence tending to show that said paper-writing was signed by the stenographer, or certified by the commissioner as the witness' deposition. It had not been filed in the Superior Court of Yancey County. In the absence of any evidence tending to show that the pages of the purported deposition, offered by defendant, contained a true and correct statement of what the witness had testified, at the time his deposition was taken, these pages were properly excluded. The record does not disclose what the witness Rozier would have replied to the question as to whether he could identify the pages offered by defendant as the testimony of the witness, G. E. Elliott, at the time his deposition was taken at Johnson City. The exception to the exclusion of the answer of the witness to the question is, therefore, not presented to this Court for review, upon defendant's appeal. *Barbee v. Davis,* 187 N. C., 78. We cannot presume that the witness would have replied that he could identify the paper-writing as the deposition of G. E. Elliott. He had testified that the deposition was taken by a stenographer and transcribed by her; there was no evidence tending to show that the witness had ever seen the paper-writing, which purported to be the deposition.

Defendant further excepted to an instruction contained in the charge of the court to the jury. While this instruction, as same appears in the case on appeal, is not clear, and is admittedly confusing with respect to the burden of proof on the first issue, defendant's assignment of error based on its exception cannot be sustained. There is no error in the instruction, for which the defendant is entitled to a new trial. We think it sufficiently appears therein that the jury were instructed that the burden upon this issue was upon the plaintiff, and that if the jury should fail to find the facts to be as she contended, they should answer the issue, "No." The judgment is affirmed. There is

No error.

STATE v. BEN JOHNSON.

(Filed 23 May, 1928.)

1. **Intoxicating Liquor — Criminal Prosecution — Burden of Proof—Directed Verdict.**

   On the trial of a criminal action the State has the burden of showing defendant's guilt beyond a reasonable doubt, and where the defendant, a witness in his own behalf, indicted under our prohibition statute, admits that he has made a purchase of whiskey, but does not state when or where, the burden is on the State to show that the purchase was made within two years, and made within the State, and an instruction directing a verdict on the issue against the defendant is reversible error.

2. **Criminal Law—Requests for Instructions—When Request for Directed Verdict Should be Made—Evidence—Intoxicating Liquor.**

   Where under an indictment for the purchase of intoxicating liquor, the State fails to prove the purchase within two years, the failure of such proof should be taken advantage of by the defendant by a request for an instruction directing a verdict in his favor.

3. **Intoxicating Liquor—Criminal Prosecution—Evidence.**

   Where on a trial for the purchase of intoxicating liquor the defendant admits the purchase, but does not state where or when the purchase was made, the exclusion of evidence offered by the defendant, which might have shown that the purchase was not made within two years, or made within the State, is reversible error.

CRIMINAL ACTION before *Moore, J.,* at November Term, 1927, of RUTHERFORD.

The defendant was charged with the unlawful possession, furnishing, transporting, purchasing and selling of intoxicating liquors. The evidence tended to show that on or about 31 July, 1927, the defendant procured, transported and furnished to one George Porter a small quantity of whiskey which Porter drank, the defendant drinking no portion thereof. Porter was arrested for being drunk and after his arrest stated to the officers that the defendant had purchased and given the whiskey to him. The defendant testified in his own behalf and denied the statements of Porter. While the defendant was on the witness stand and during cross-examination he testified: "I bought some liquor one time from Walt Davis, paid $1.50 a pint for it. He lives at Sulphur Springs." Thereupon in response to a question from the court the witness testified that he got a pint from Davis and left it in the woods. Thereupon the trial judge said: "Let a verdict of guilty be entered. Gentlemen of the jury, if you believe the defendant's own statement about it, you will return a verdict of guilty. Take the case."

From the judgment of imprisonment for a term of one year to be worked on the roads the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

T. J. Moss for defendant.

BROGDEN, J. It will be observed that the peremptory instruction of the trial judge to the jury was apparently based upon a statement by the defendant on cross-examination relating to the purchase of a pint of liquor from Walt Davis rather than upon the testimony offered at the trial upon the bill of indictment. It does not appear that the defendant purchased the liquor from Davis within two years, or indeed whether it was purchased within the State of North Carolina. The burden of proof is on the State to show that the crime was committed within two years, and a failure to make such proof should be taken advantage of by the defendant by a request to instruct the jury. *S. v. Francis,* 157 N. C., 612, 72 S. E., 1041, *S. v. Brinkley,* 193 N. C., 747, 138 S. E., 138. The record discloses, however, that after the court had directed a verdict counsel for defendant stated that he had further evidence and the court remarked, "It wouldn't help you any." Thus the defendant was precluded from offering evidence as to when and where the purchase from Davis had been consummated if such evidence was available. The principle covering this case, as disclosed by the record, is thus declared in *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152. "In *S. v. Estes,* 185 N. C., 752, it is held that it is a recognized principle that a trial judge is not justified in directing a verdict of guilty in a criminal action, but where as an inference of law the uncontradicted evidence if accepted as true, establishes the defendant's guilt, it is permissible for the court to instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. The law in this State, as repeatedly declared by this Court, is that a plea of not guilty, to a criminal charge, at once calls to the defense of defendant the presumption of innocence, denies the credibility of evidence for the State; and casts upon the State the burden of establishing guilt beyond a reasonable doubt. *S. v. Singleton. supra.* These words are not mere formalities, but express vital principles of our criminal jurisprudence and criminal procedure. These principles ought not to be readily abandoned, or worn away by invasion. As said by *Justice Hall, In re Spier,* 12 N. C., 492, nearly a century ago, 'Although a prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be a bulwark of safety to those who, more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not.' "

New trial.

M. FEIGEL & BROTHER, INCORPORATED, v. CAROLINA WOOD PRODUCTS COMPANY.

(Filed 23 May, 1928.)

Contracts—Performance or Breach—Acts Held Not a Breach—Nonsuit.

In a contract for two hundred barrels of shellac, shipments to come forward biweekly, buyer to advise when shipments to commence and number of barrels to be included in each shipment: *Held,* an order by the buyer of two barrels of shellac to be shipped every two weeks until further notice is not so unreasonable as to amount to a breach of the contract by the buyer, and the buyer's motion of nonsuit is properly entered in the seller's action for breach.

APPEAL by plaintiff from *Oglesby, J.,* at November Term, 1927, of BUNCOMBE.

Civil action to recover damages for an alleged breach of contract.

Plaintiff declares on a written order dated 21 November, 1925, for 200 barrels of shellac, which order is signed by the defendant and contains, among other things, the following provision:

"Shipments to come forward in biweekly shipments, we (defendant) to advise when shipment to commence and number of barrels to be included in shipment."

After the exchange of a number of letters, the plaintiff, on 24 May, 1926, wrote the defendant that if shipping instructions were not given, within a reasonable time, it would consider the contract breached and proceed accordingly. In answer, the defendant, on 28 May, instructed the plaintiff that, in accordance with the terms of the order, 2 barrels of pure white shellac might be shipped every two weeks until further notice.

Plaintiff regarded these instructions so unreasonable as to amount to a breach of the contract; and instituted this suit to recover damages therefor.

From a judgment of nonsuit entered on motion of defendant at the close of plaintiff's evidence, plaintiff appeals, assigning error.

Isadore Shapiro and Harkins & Van Winkle for plaintiff.
Barnard & Heazel for defendant.

STACY, C. J. It was earnestly insisted on the argument that no contract had been shown, as the defendant's order was not to be binding until approved by the plaintiff in New York, and no such approval appears from the evidence.

Conceding without deciding that the evidence is sufficient to establish a binding contract between the parties, as alleged by the plaintiff, still the judgment of nonsuit would seem to be correct unless the shipping instructions of the defendant were so unreasonable as to amount to a breach of the contract, which we cannot hold. They were within the letter of the agreement, and it is the simple law of contract that "as a man consents to bind himself, so shall he be bound." Elliott on Contracts (Vol. 3), sec. 1891; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Clancy v. Overman,* 18 N. C., 402.

Affirmed.

J. H. BOLCH v. E. L. SHUFORD ET AL.

(Filed 23 May, 1928.)

Trial—Nonsuit—Nonsuit Should Not Be Entered on Conflicting Evidence—Questions for Jury—Partnership.

In an action to enforce a contractor's lien, where the evidence is conflicting as to whether the contractor and the owner were in partnership, sharing the profits and losses in the construction of a building, and the defendant is the present owner by deed: *Held,* upon conflicting evidence upon this question, an issue is raised for the jury to determine, and a judgment as of nonsuit thereon is improperly entered.

CIVIL ACTION before *Townsend, Special Judge,* at Special Term, 1927, of CATAWBA.

On or about 1 May, 1926, the defendant Shuford owned a lot on Melrose Avenue in that section of Asheville known as Gracelynn, and on said date plaintiff alleges he was employed by the owner to erect a dwelling-house on said lot; that the dwelling-house was erected, and that there is due the plaintiff the sum of $931.90. The evidence tended to show that on 22 October, 1926, the defendant Shuford and wife conveyed the property to his codefendants, Michalove and Pearlman, and that thereafter on 1 November, 1926, and within six months from the completion of said dwelling-house plaintiff filed a lien upon the premises as provided by law and this action was instituted to enforce the lien. It seems that judgment was taken by default against Shuford, but the defendants, Michalove and Pearlman, filed an answer admitting that they were the purchasers of said property from Shuford and alleging as a defense that as a matter of fact the plaintiff and said Shuford were partners in the construction of said house, and that therefore the effort of plaintiff to file a lien on the property was "merely" a scheme or a device of plaintiff, J. H. Bolch, and E. L. Shuford to try to compel these defendants to pay an additional sum over and above what they agreed to pay for the property when purchased from said E. L. Shuford. The alleged partnership agreement was introduced in evidence and tended to show that plaintiff was to receive an equal share of the profits upon "the two houses which said Bolch and Shuford are building on said Shuford's lots near Asheville." Plaintiff denied that any partnership existed between him and Shuford and testified further that the written agreement relied on by the defendants, Michalove and Pearlman, did not cover the house in controversy.

At the conclusion of all the evidence judgment of nonsuit was entered and the plaintiff appealed.

J. W. Aiken for plaintiff.
A. A. Whitener for defendants.

BROGDEN, J. The main question involved in the appeal is whether or not a partnership existed between the plaintiff and defendant Shuford with respect to the construction of the house upon which plaintiff filed a lien.

"When the facts are undisputed, what constitutes a partnership is a question of law, and the usual, not the universal, test is participation in profits and losses attending the enterprise." *Webb v. Hicks,* 123 N. C., 244, 31 S. E., 479; *Kootz v. Tuvian,* 118 N. C., 393, 24 S. E., 776; *Lance v. Butler,* 135 N. C., 422, 47 S. E., 488; *Trust Co. v. Ins. Co.,* 173 N. C., 558, 92 S. E., 706; *Machine Co. v. Morrow,* 174 N. C., 198, 93 S. E., 722; *Gurganus v. Mfg. Co.,* 189 N. C., 202, 126 S. E., 423.

However, in the case at bar the facts are in dispute. Plaintiff testified that he was not a partner and that the written agreement offered in evidence to prove the partnership did not cover the house in controversy. An issue of fact was thus sharply drawn and the question should have been submitted to the jury.

Reversed.

FRANK H. BRADLEY v. A. M. CHURCH.

(Filed 23 May, 1928.)

Wills—Construction—Estates and Interests Created—Rule in Shelley's Case.

The terms of a devise of lands for life with remainder to the heirs of the body of the first taker fall within the rule in *Shelley's case*, and as a construction of law, the title in fee passes to the first taker, without regard to the intent of the testator.

APPEAL by defendant from *Schenck, J.*, at November Term, 1927, of CALDWELL. Affirmed.

Squires & Whisnant for plaintiff.
Self & Bagby for defendant.

ADAMS, J. The plaintiff brought suit to recover a tract of land and damages for its wrongful detention. The complaint was denied and the title was put in issue. The controversy was heard upon an agreed statement of facts and judgment was given in favor of the plaintiff. The defendant excepted and appealed.

Both parties claim under the will of John C. Link, the fifth item of which is as follows: "Of my lands west of a direct line from said white oak corner to a stake in the middle of the Double Shoals public road where said road crosses my northern boundary line, except the twenty acres devised to L. Pinkney Link, I give and devise one-fourth part to my daughter, Harriet Adeline White, in fee; one-fourth part to my daughter, Malissa Catherine Fisher, in fee; one-fourth part to my daughter, Annie Elizabeth Moose, in fee; one-fourth part to my daughter, Sarah Louellen Mull, for the term of her natural life, remainder in fee to the heirs of her body."

The question is whether the devise of a one-fourth part of the testator's lands to his daughter Sarah Louellen Mull "for the term of her natural life, remainder in fee to the heirs of her body" conveys title in fee. It can hardly be contended that it does not fall within the rule in *Shelley's case:* "When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation of the estate, and not a word of purchase." 1 Coke, 104.

The appellant takes the position that the devise indicates the testator's intention to give to Sarah Louellen Mull nothing more than a life estate. However plausible this contention may be we are confronted with the principle that the rule in *Shelley's case* is not a rule of construction, but a rule of law, and therefore whatever the testator's intention may have been if he devises property, as in this case, to the first taker for life, with remainder in fee to his heirs or the heirs of his body, and there are no superadded words, the rule applies and the whole estate vests in the first taker. *Nichols v. Gladden,* 117 N. C., 498; *Reid v. Neal,* 182 N. C., 192; *Hampton v. Griggs,* 184 N. C., 13; *Bank v. Dortch,* 186 N. C., 510; *Hartman v. Flynn,* 189 N. C., 452; *Benton v. Baucom,* 192 N. C., 630; *Martin v. Knowles, ante,* 427.

It is conceded that if Sarah Louellen Mull acquired a fee to her part of the land there is no error in the judgment.

Affirmed.

A. L. THOMPSON v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 23 May, 1928.)

Negligence — Proximate Cause — Negligence to Be Actionable Must Be Proximate Cause—Nonsuit.

Negligence is not actionable unless it causes, or contributes in causing the injury in suit, and where the evidence discloses that it was independently and entirely caused by an act of a third person, a judgment as of nonsuit should be entered thereon.

APPEAL by defendant from *Harding, J.,* at November Term, 1927, of GUILFORD.

Civil action to recover for a personal injury which necessitated the amputation of plaintiff's leg about six inches below the knee, alleged to have been caused by the negligence of the defendant's lessee, the Southern Railway Company.

The injury occurred about 3:15 a. m. on the morning of 8 July, 1924, while the plaintiff was sitting in his Hup roadster at the Jackson Street railroad crossing in the city of Greensboro, N. C., about 20 or 25 feet from the defendant's tracks, waiting for two freight trains to pass, one going northward on the north-bound track and the other running southward on the south-bound track, when a truck driven along the street by some unknown person, hit the rear of plaintiff's automobile, pushed his car against the moving train, and as plaintiff jumped from his roadster, in an effort to save himself, one of his legs was caught beneath the wheels of the moving train and crushed to such an extent as to require amputation. The driver of the truck was never apprehended.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. From the judgment entered thereon, the defendant appeals, assigning errors, relying chiefly upon its exception to the refusal of the court to grant its motion for judgment as of nonsuit.

H. L. Koontz and Banks H. Mebane for plaintiff.
Hobgood, Alderman & Vinson for defendant.

Stacy, C. J., after stating the case: The negligence alleged is that the defendant's lessee, the Southern Railway Company, failed to comply with the ordinances of the city of Greensboro, (1) requiring a flagman to be stationed at Jackson Street crossing, (2) requiring "that every railroad company shall keep the street crossing sufficiently lighted to enable the public to see moving trains after dark," (3) providing that "no railroad engine or train shall run or be propelled at a greater rate of speed than twenty miles an hour within the city," (4) providing that "it shall be unlawful for any railroad company to allow two engines or trains to cross any street in the city at the same time from opposite directions," (5) providing that all railroad companies, having tracks in the city of Greensboro, shall board the grade crossings with oak planks of the thickness of the height of the rail.

A number of interesting questions are debated on brief, but a careful perusal of the record leaves us with the impression that under the decisions in *Ballinger v. Thomas, ante,* 517, *Lineberry v. R. R.,* 187 N. C., 786, 123 S. E., 1, *Harton v. Telephone Co.,* 146 N. C., 429, 59 S. E., 1022, and the principles they illustrate, the evidence offered on the hearing, taken in its most favorable light for the plaintiff, fails to show any *tort* liability on the part of the defendant, or its lessee, for which the plaintiff may recover in damages. For this reason, we think the defendant's motion for judgment as of nonsuit should have been allowed.

One may be ever so negligent, but unless such negligence proximately produces injury to another, no action for damages can be maintained therefor. *Drum v. Miller,* 135 N. C., 204, 47 S. E., 421. In other words, to constitute actionable negligence, there must be both negligence—the breach of some duty owed to the plaintiff—and injury proximately resulting therefrom. *Hurt v. Power Co.,* 194 N. C., 696.

Reversed.

O. D. WALLACE, B. C. WALLACE AND L. C. WALLACE, COPARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF WALLACE BROS., v. R. B. PHILLIPS AND MAGGIE PHILLIPS, HIS WIFE; MAMIE PHILLIPS, KENNETH PHILLIPS, GURNIE PHILLIPS, SWANNIE PHILLIPS, FLOSSIE PHILLIPS, HUGH PHILLIPS, ALICE PHILLIPS, EARL PHILLIPS, AND MAMIE PHILLIPS, ADMINISTRATRIX OF R. B. PHILLIPS, DECEASED; AND MAGGIE PHILLIPS, GUARDIAN AD LITEM OF HUGH PHILLIPS, ALICE PHILLIPS AND EARL PHILLIPS.

(Filed 23 May, 1928.)

1. **Partition—Actions for Partition—Conclusiveness of Judgment Therein—Parties Concluded—Matters Concluded.**

While a proceeding to partition land among tenants in common cannot confer title, but is only a division among the tenants of the land held in common under the title they had, the judgment therein is conclusive among the parties and privies, and conclusive of their interest in the lands partitioned.

2. **Husband and Wife—Gifts to Wife—Husband is Estopped by Partition in Which He Acknowledges a Remainder to Her.**

Where a bankrupt is allotted an undivided interest in certain lands as his homestead and the remainder in the undivided interest in such lands is sold to make assets, and at the sale it is bought by the wife of the bankrupt, and the land is partitioned by order of court, and in the partition proceeding the husband acknowledges the interest in remainder of his wife: *Held*, the judgment in the partition proceeding estops the husband from denying the interest of his wife, and operates as a gift to her.

3. **Fraudulent Conveyances—Remedies of Creditors—Pleadings—Allegations Necessary to Set Aside Gift to Wife.**

In order for a creditor of a husband to set aside a gift to his wife as fraudulent against creditors, his complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer thereto is good.

APPEAL by plaintiffs from *Oglesby, J.*, at December Term, 1927, of MOORE. Affirmed.

The material allegations of the complaint:

(1) The plaintiffs allege that on 7 December, 1908, John McKenzie and Lydia McKenzie, his wife, made, executed and delivered, to Chas. A. Jones and the defendant, R. B. Phillips, a deed to three certain tracts of land, describing same, in Moore County, which deed was duly recorded in the office of the register of deeds for said county, on 8 January, 1909. That by the said deed R. B. Phillips became the owner of one-half undivided interest in said land.

(2) On 30 April, 1911, R. B. Phillips filed a voluntary petition in bankruptcy in the United States District Court for Eastern District of

North Carolina, and was duly adjudged a bankrupt about 1 May, 1911. That D. A. McDonald, about 31 May, 1911, in pursuance of the provisions of the bankrupt act was duly elected trustee, qualified and took possession and charge of the estate of R. B. Phillips.

(3) That on 17 June, 1911, the undivided one-half interest in the before mentioned three tracts of land under the provisions of the bankrupt act was allotted to R. B. Phillips as his homestead.

(4) That about 1 April, 1912, the said trustees in bankruptcy purported after due advertisement to offer and sell the alleged reversionary interest in the homestead of R. B. Phillips, subject to the homestead interest therein in and to the three tracts of land before mentioned. R. L. Burns became the last and highest bidder for the purported interest at the price of $251, and purported to assign and transfer his bid to Maggie Phillips, defendant, wife of R. B. Phillips. A purported deed, dated 11 April, 1912, was made to her by D. A. McDonald, trustee aforesaid, for the reversionary interest in said land.

(5) That on 15 January, 1913, R. B. Phillips and wife, Maggie Phillips, defendants in this action, brought a special proceeding against Chas. A. Jones, to partition said lands, alleging that R. B. Phillips at said time was the owner of a life estate and Maggie Phillips the reversionary interest in one-half of said land at his death, and the said Chas. A. Jones the other half interest. Commissioners were duly appointed and the land partitioned and the land allotted to the respective parties. Lot No. one, was allotted and assigned to R. B. Phillips and Maggie Phillips, describing same by metes and bounds.

(6) That on 24 January, 1918, the plaintiffs in this action brought an action against the defendant, R. B. Phillips, in the Superior Court of Moore County, and recovered judgment for $1,239.75 and costs, with interest on $328.46 from 10 January, 1917. Interest on $500 from 26 June, 1917, interest on $411.29 from 23 January, 1918. The judgment was rendered 11 February 1918, and docketed on judgment docket of said county 19 February, 1918. That most of the indebtedness of the said R. B. Phillips was contracted *long before 10 January, 1917.*

(7) The plaintiffs allege that the purported sale and deed from D. A. McDonald, trustee, to Maggie Phillips, the defendant, was *illegal and void.* R. B. Phillips was and is now the owner and the lien of plaintiffs' judgment creditors attached. That the $251, the price of the bid for the land was furnished by and was money of R. B. Phillips, the said Maggie Phillips being wholly insolvent, and the land was bid in by R. B. Phillips' attorney at his instance. That the "said purported sale and said purported purchase and the acquisition by the defendant, Maggie Phillips, of said purported deed, was brought about by the said de-

fendants, and each of them, with the intent and the purpose of defrauding the creditors of the said R. B. Phillips, including the plaintiffs."

(8) The allegation is made in the partition proceedings, with like intent, the said Phillipses received more than a half interest and more than they were entitled to have allotted to them, and that R. B. Phillips paid to Chas. A. Jones the extra consideration. That for the reasons stated, R. B. Phillips is the real owner of the land and plaintiffs' judgment against R. B. Phillips is a lien on the land.

(9) That since the execution and delivery of the purported deed aforesaid, from D. A. McDonald, trustee in bankruptcy of R. B. Phillips, to Maggie Phillips, the defendant, R. B. Phillips, while the indebtedness to plaintiff from R. B. Phillips herein alleged subsisted, has furnished large sums of money from time to time and made many and very valuable improvements upon said tract of land, described as Lot No. 1 in said partition proceeding, and has made said improvements and made contributions from his own funds thereto for the purpose of cheating and defrauding his creditors of the money invested upon said land, including the plaintiffs, and the defendant, Maggie Phillips, has participated knowingly in said fraud, as the plaintiffs are informed and believe, and so allege (while the indebtedness to plaintiffs from R. B. Phillips herein alleged subsisted)—added by amendment.

(10) That the land allotted to R. B. Phillips, as his homestead, has greatly enhanced and increased in value and is now worth several thousand dollars and much more than the homestead interest to which the said R. B. Phillips is entitled therein under the laws and Constitution of the State, and has, furthermore, been enhanced in value greatly, by reason of improvements placed thereon by the said defendant, R. B. Phillips, from his own funds since the allotment of said homestead to the said R. B. Phillips, and the plaintiffs are entitled, in equity, to a reallotment of the said homestead to the said R. B. Phillips, to the end that the excess in the value of said lands over and above the homestead of the said R. B. Phillips may be sold under the course and practice of the court to satisfy and discharge the indebtedness due to the plaintiffs upon the judgment of the plaintiffs aforesaid set forth, as the plaintiffs are advised, informed and believe, and so allege.

Plaintiffs allege on account of the fraud, as before set forth, the purported deed to Maggie Phillips is fraudulent and void as to the plaintiffs, and ask it be set aside and declared void and decreeing the judgment of plaintiffs the first lien on the land and decreeing that the said lands in excess of the constitutional homestead of defendant, R. B. Phillips, be sold to pay their judgment. That the land of R. B. Phillips be reappraised and his homestead reallotted and the excess be sold and applied on plaintiffs' judgment. The defendant, R. B. Phillips, died and, on motion duly made by plaintiffs, on 17 November, 1925, the children and heirs at law of R. B. Phillips were made parties defendants and duly served with summons. Thereafter, at September Term, 1926, a *guardian ad litem* was appointed for infant defendants and the *guardian ad litem* and the administrator of R. B. Phillips were made parties. Amended complaint and answer were filed, and the only material change is plaintiffs' allegation that on the death of R. B. Phillips the homestead terminated and ceased, this is denied by defendants.

The defendants demurred *ore tenus* to the plaintiffs' complaint, as not stating a cause of action specifically:

"1. For that it does not appear that plaintiffs' debt was outstanding at the time of the various acts of fraud alleged or that plaintiffs would be entitled to any relief with respect thereto, and any fraud complained of is not sufficiently alleged.

"2. For that it appears from the complaint that all the title and rights of the defendant debtor, R. B. Phillips, in the property sought to be subjected, except as to the homestead itself, have been extinguished: (1) by the deed of the trustee in bankruptcy; and (2) by the partition proceeding set up in the complaint before plaintiffs' debt was in existence, and does not affirmatively appear that plaintiffs' debt or judgment existed prior thereto. At the close of the argument, plaintiffs requested permission to amend paragraph of the complaint, by inserting the following: 'While the indebtedness to plaintiffs from R. B. Phillips herein alleged subsisted,' and announced that they would not amend in any further respect."

"Thereupon, defendants renewed their motion and specifically pointed out as a ground for the demurrer as to the sufficiency of amended paragraph and the rest of the complaint that, as amended, it does not state a cause of action and is insufficient for that it states only conclusions of law with reference to the fraud alleged to have been perpetrated and does not state facts or conclusions of facts as required by the practice of the court and the statutes as to pleading, and specifically does not allege the insolvency of the defendant, Phillips, and that he did not retain sufficient property to pay his debts, or other facts from which fraud could be found."

The court below rendered the following judgment: "This cause coming on and being called for trial and being heard upon the motion of the defendants, through their counsel, who demurred *ore tenus* to the complaint as not stating a cause of action and moved to dismiss the action for said reason and for specific objections thereto fully set out in the oral argument; after hearing argument upon said demurrer and motion, the court is of opinion that the said demurrer of the defendants should be sustained; and it is hereby sustained and the motion to dismiss allowed for said cause, and it is ordered that the plaintiffs pay the costs of this action to be taxed by the clerk, and that the defendants recover of the plaintiffs and their surety on their prosecution bond their costs of this action to be taxed by the clerk of the court."

U. L. Spence for plaintiffs.
Gavin & Teague and Seawell & McPherson for defendants.

CLARKSON, J. The following questions presented in brief of defendants, appellees, we think, from the record, cover practically the present controversy for our determination:

"1. Is the sale of the reversionary interest in the homestead of a bankrupt upon orders of the bankrupt court void, so that a creditor of the bankrupt whose debt arose several years after the sale and conveyance of such reversion may still treat the property as being the homestead of the bankrupt and subject to levy?

"2. In this case, plaintiffs seek to set aside the deed of a trustee in bankruptcy as being a fraud on creditors; but it appears from the complaint that plaintiffs' debt arose long after such conveyance. Have plaintiffs any cause of action based on fraud in such conveyance?

"3. Where a creditor attempts to follow the investment of a debtor (husband) in his wife's property upon the grounds of fraud, is an averment in the complaint sufficient, which merely states that the investment was fraudulent, without stating facts or particulars constituting the fraud, and especially without stating that the debtor was at the time of such investment insolvent and did not retain property fully sufficient and available to pay his debts then existing?"

The first interesting question: See *Williams v. Scott,* 122 N. C., p. 545 and cases cited; *Joyner v. Sugg,* 131 N. C., p. 324; *Watters v. Hedgepeth,* 172 N. C., at p. 314; *Hartman v. Flynn,* 189 N. C., p. 452. The record discloses that on 15 January, 1913, R. B. Phillips and wife, Maggie Phillips, brought an action against Chas. A. Jones to partition the lands which were originally deeded to Chas. A. Jones and R. B. Phillips, as tenants in common, each owning an undivided one-half interest. The Phillipses alleged *in the partition proceeding that at the time R. B. Phillips was the owner of a life estate and Maggie Phillips the reversionary interest in one-half of said land.* Commissioners were duly appointed and the land actually partitioned by metes and bounds and one-half allotted to R. B. Phillips and Maggie Phillips, in accordance with the petition. It must be conceded that all of the parties, who were *sui juris,* are bound by the final decree rendered upon the merits, without fraud or collusion in the partition proceeding and the same is conclusive on the rights of the parties or their privies.

In 20 R. C. L., part sec. 57, p. 785, it is stated thus: "It is a well affirmed principle of law that a judgment or decree in a partition suit, when the court has jurisdiction over the parties and the subject-matter, is as conclusive between the parties upon all the material issues in the case which the court was called upon to examine, and which, under the pleadings, were tried and determined, as are judgments in other actions; but rights of defendants, as between themselves, which were not brought to the attention of the court are not concluded." See *Walker v. Walker,* 185 N. C., 380; *Cook v. Sink,* 190 N. C., 620; *Randolph v. Edwards,* 191 N. C., 334; *Garris v. Tripp,* 192 N. C., 211; *Valentine v. Granite Corp.,* 193 N. C., 578. Ordinarily, when there is a partition of realty, by deed or action, between tenants in common, it only severs the unity of possession and conveys no title. Here the parties changed the title and created a new one, at least consented and agreed to a new title.

By the solemn allegations of the petition and decree taken in connection therewith, R. B. Phillips had a homestead life estate and Maggie Phillips the reversionary interest in the land in controversy. Conceding, but not deciding, that the sale of the reversionary interest to Maggie Phillips conveyed no title—then her husband owned it and in the petition in the partition proceeding, which he and she join in, it was expressly alleged that he owned a life estate and she the reversionary interest. It was allotted to them in accordance with the petition. The petition was a solemn admission of her ownership of the reversionary interest. He recognized her right and if the deed to her was inoperative, he had a right to recognize and agree that it was operative and give this reversionary interest to her, provided, in accordance with C. S., 1007: "*If property, at the time of making such gift or settlement fully sufficient and available for the satisfaction of his then creditors be retained by such donor or settler,*" and there is no actual intent to defraud. There is no allegation that he had creditors at the time. The law presumes a gift to the wife. *Carter v. Oxendine,* 193 N. C., 478; *Bank v. Crowder,* 194 N. C., 312.

The second question: we do not think plaintiffs can sustain. The partition proceeding was instituted 15 January, 1913. Years afterwards, on 24 January, 1918, plaintiffs instituted an action against R. B. Phillips and recovered a judgment duly docketed for $1,239.75, for debts contracted, most of them long before 10 January, 1917. There is no allegation that these debts were contracted before the partition in 1913, when, as we construe the facts of record, R. B. Phillips had a homestead life estate in the land and Maggie Phillips a reversionary interest in fee actually allotted to them.

The controlling principle is stated in *Aman v. Walker,* 165 N. C., 224, 227, 81 S. E., 162, as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally." *Sutton v. Wells,* 177 N. C., 524, 527, 99 S. E., 365; *Tire Co. v. Lester,* 190 N. C., 411.

The third question: we do not think plaintiffs can sustain. The plaintiffs were allowed to amend their complaint by adding "While the indebtedness to plaintiffs from R. B. Phillips herein alleged subsisted." R. B. Phillips had a homestead exemption in the land and Maggie Phillips the reversionary interest in fee, according to the partition decree. The plaintiffs' allegations are to the effect that while R. B. Phillips was indebted to the plaintiffs, he increased the value of his homestead exemptions by taking large sums of money that he should have paid the plaintiffs, his creditors, and made many and valuable improvements on his homestead tract. It is an old saying founded on good morals, that a man must be just before he is generous. He must pay his debts first. In good conscience he should not be allowed to materially enhance the value of his homestead at the expense of his creditors, and especially would this be so as in the present case, the reversionary interest goes to another than the creditors at his death. This is an equitable and just principle.

In the case of *Michael v. Moore,* 157 N. C., at p. 465, citing numerous authorities, it was said: "We entertain no doubt as to the plaintiffs' right to follow the fund invested by his debtor in improvements upon his wife's land. No principle is better settled by our decisions than the one that an insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and when it is done, creditors may subject the property so purchased or improved to the payment of their claims." In the above case, the facts show: "At the time of the transaction the defendant J. O. Moore was insolvent. After plaintiff had exhausted his legal remedies by execution and supplemental proceedings, he instituted this proceeding for equitable relief."

In *Garland v. Arrowood,* 177 N. C., at p. 374, it is said: "The jury have found that there was no actual intent to defraud or, in other words, no *mala mens,* but if the defendant, the donor of the gift, failed to retain property fully sufficient and available for the satisfaction of his then creditors, the gift was void in law, without regard to the intent with which it was made. *Black v. Saunders,* 46 N. C., 67; *Aman v. Walker,* 165 N. C., 224; *Michael v. Moore,* 157 N. C., 462. The burden of at least going forward with proof of such retention of property is upon the defendant, where, as found in this case by the jury, there is a voluntary gift or settlement. *Brown v. Mitchell,* 102 N. C., 347, 369; *Tredwell v. Graham,* 88 N. C., 208; *Cook v. Guirkin,* 119 N. C., 13; *Aman v. Walker, supra.*"

In *Garland v. Arrowood,* 179 N. C., 697, the issue submitted was: "Did the defendant, Luther C. Arrowood, at the time he invested his individual funds in the improvements on the land of William Arrowood, known as the 'home place,' retain property fully sufficient and available for the satisfaction of his then creditors? The jury responded that he did not." In the opinion it is said: "We think that the land should be subjected to a lien for the increased value added to it, and no further."

C. S., 1007, is as follows: "No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper."

In the *Aman case, supra,* at p. 227, it is held: "If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid." The allegations show a voluntary gift or settlement of property (many and very valuable improvements) by R. B. Phillips, while indebted to plaintiffs, on his homestead, the reversionary interest being owned by Maggie Phillips. This, under the statute, is not to be deemed or taken to be void in law by reason merely of such indebtedness, if property at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such settler, and there is no actual intent to defraud. "This is made a condition precedent in order to bring a case within the operation of the act." *Black v. Sanders,* 46 N. C., at p. 69.

The defendants demur on the ground that the complaint "does not allege the insolvency of the defendant, Phillips, and that he did not retain sufficient property to pay his debts." We think the complaint to be good should have alleged that at the time of making such gift or settlement property fully sufficient and available for the satisfaction of his then creditors was not retained. This was a material ingredient of the cause of action and should have been alleged. When fraud is sufficiently pleaded, see *Colt v. Kimball,* 190 N. C., p. 171.

The other matters we need not now consider. For the reasons given, the judgment of the court below is

Affirmed.

STEWART WINKLER v. LENOIR AND BLOWING ROCK LINES, INCORPORATED, ET AL.

(Filed 23 May, 1928.)

Malicious Prosecution—Termination of Prosecution—Actions Held Terminated—Justices of the Peace.

While an action for damages for malicious prosecution depends upon the final determination of the criminal action upon which civil action is based, the particular manner of the termination of the criminal action is not controlling so that the defendant therein is fully discharged; and when the justice of the peace continues it upon a request of the prosecuting witness, and more than thirty days has passed without a trial, in which the prosecutor has remained inactive, the criminal proceeding is terminated under rule 15, C. S., 1500, restricting a continuance of a case by a justice of the peace to thirty days.

APPEAL by plaintiff from *McElroy, J.,* at September Term, 1927, of WATAUGA. Reversed.

Action for malicious prosecution of plaintiff upon a warrant procured by defendants, charging him with a crime.

From judgment dismissing the action, upon defendants' motion, at the close of the evidence, plaintiff appealed to the Supreme Court.

Trivette & Comer and Brown & Bingham for plaintiff.
F. A. Linney and W. C. Newland for defendants.

CONNOR, J. Plaintiff was arrested by a deputy sheriff of Caldwell County, pursuant to a warrant issued by a justice of the peace of said county, on 10 July, 1926. The warrant was issued at the request and upon the complaint of the defendant, L. L. Pipes, secretary of his co-defendant, Lenoir and Blowing Rock Lines, Inc. An employee of the latter defendant, at the direction of its secretary, accompanied the deputy sheriff, and aided him in making the arrest. The complaint upon which the warrant was issued charged that plaintiff on 10 July, 1926, did unlawfully transport passengers into Lenoir, without license, and on the schedule of the Lenoir and Blowing Rock Lines, Inc., in violation of the statute.

Immediately following his arrest, plaintiff was taken by the deputy sheriff, who had arrested him, before the justice of the peace, who had issued the warrant, for trial. At the request of plaintiff, the trial was continued for one week. At the expiration of this week, and at the hour and place fixed by the justice of the peace, plaintiff appeared, and announced his readiness for trial upon the warrant. The prosecutor was not present; no witnesses had been subpœnaed for the prosecution, and none were present. The justice of the peace thereupon informed the plaintiff that he could go, and stated to him that he need not return for trial, unless he was further notified to do so. Defendant was not required to give bond, or to enter into his personal recognizance for his further appearance. No further notice was given to plaintiff to return for trial, nor was any further action taken by either of defendants with respect to the prosecution of plaintiff upon the warrant. No costs incurred by the issuance of the warrant have been paid, nor has any judgment been entered in the action, formally terminating the same. More than seven months elapsed from the date of the discharge of plaintiff by the justice of the peace to the date on which this action was commenced. During this time, neither of the defendants took any action toward the further prosecution of plaintiff upon the charge on which he was arrested and on which the warrant was issued, or with respect to the termination of the action.

This action to recover of the defendants damages for the malicious prosecution of plaintiff, on the warrant procured by them, and on which he was arrested, was begun on 12 February, 1927. At the close of the evidence offered by the plaintiff, upon motion of defendants, judgment was rendered, dismissing the action as upon nonsuit. C. S., 567. From this judgment plaintiff appealed to this Court, assigning as error the order of the court allowing defendants' motion for judgment as of nonsuit, to which he duly excepted.

The only question presented by this appeal, as appears from the briefs filed in this Court, is whether there was evidence tending to show that the prosecution of plaintiff on the warrant procured by defendants had terminated prior to the commencement of this action. This question both upon principle, and upon authoritative decisions of this Court, must be answered in the affirmative.

In *Brinkley v. Knight,* 163 N. C., 195, *Hoke, J.,* says: "It is the well established position that before an action for malicious prosecution can be instituted, it is necessary that the proceedings upon which it is based, should have been properly terminated. *Wilkinson v. Wilkinson,* 159

N. C., 266; *Stanford v. Grocery Co.,* 143 N. C., 419; *Welch v. Cheek,* 125 N. C., 353; *Hatch v. Cohen,* 84 N. C., 602; *Rice v. Ponder,* 29 N. C., 390; *Murray v. Lackey,* 6 N. C., 368." See, also, *Turnage v. Austin,* 186 N. C., 266; *Hadley v. Tinnin,* 170 N. C., 84; *Carpenter v. Hanes,* 167 N. C., 551, 38 C. J., 437.

Ordinarily, in order to maintain an action for malicious prosecution, the plaintiff therein must allege and prove that the prosecution upon which the action is founded, was terminated by a formal judgment, supported by a verdict or finding that plaintiff, as defendant therein, was not guilty as charged by the defendant, as prosecutor. The rule is stated in 38 Corpus Juris, 437, in section 85, as follows: "Subject to some exceptions, no action lies, nor can a cross-action be brought, or a counterclaim or recoupment be asserted, before the legal termination of the criminal prosecution or civil action which forms the basis of the action. . . . Further, subject to some exceptions, it is also necessary to the maintenance of the action that the proceedings complained of should have terminated in favor of the defendant therein. Until such original proceeding has been so finally ended, there is no remedy because there is no wrong, and questions concerning want of probable cause, and malice are immaterial."

In *Murray v. Lackey,* 6 N. C., 368, it was held that to support an action for malicious prosecution, in taking out a warrant against plaintiff on a charge of perjury, it is necessary for plaintiff to show a discharge. This was shown by evidence that plaintiff, having given his recognizance to appear at the succeeding term of the Superior Court, made his appearance, and was discharged by the solicitor for the State, who told him and the sureties on his recognizance that he might go home. In the opinion it is said that "a discharge means, where the proceedings are at an end, and cannot be revived. A party bound over to court has only to attend, and, according to our mode of practice, when the term expires stands discharged, unless rebound, or his default recorded." It was further held that it is immaterial whether or not a discharge *nunc pro tunc* is entered in the criminal action.

In *Rice v. Ponder,* 29 N. C., 390, plaintiff was arrested upon a warrant charging him with the crime of larceny in Yancey County. He was required to give bond for his appearance at the succeeding term of the county court of Yancey County to answer the charge. He made his appearance as required by his bond. No indictment was returned against him, and he was not required to give bond for his further appearance. An entry on the docket of the county court showed that the solicitor, on examining the witnesses, was of opinion that the charge could not be sustained, for that the testimony of the witnesses failed to show that the taking occurred in Yancey County. The trial court refused to instruct the jury that plaintiff could not recover in the action for malicious prosecution because he had not shown that the prosecution had been finally determined. This Court held, upon defendant's appeal from a judgment in favor of plaintiff, that there was no error in the refusal of the trial court to instruct the jury, as requested by defendant, citing *Murray v. Lackey, supra,* as direct authority in support of such refusal. It is said in the opinion that plaintiff was not only not rebound, and thus stood discharged, according to that case, but it is clear from the memorandum of the State's attorney on the docket, that the proceeding was intended and considered to be at an end.

In *Hatch v. Cohen,* 84 N. C., 602, a *nolle prosequi* was entered in the criminal action in which plaintiff was indicted for burglary. This entry was made by the solicitor for the State, with the consent of the presiding judge, and at the express request of defendant. Plaintiff, the defendant in the criminal action, was thereupon discharged from custody. In the opinion written by *Ruffin, J.,* it is said: "All the authorities agree in saying that, in an action like the present one, the plaintiff must allege and prove a legal determination of the original action, but they differ as to whether the entry of *nolle prosequi* in a criminal prosecution is such a determination of it as will justify the bringing of the other action." Upon the authority of the decisions in *Murray v. Lackey,* and *Rice v. Ponder,* it is said: "From these two cases we learn that, although a plaintiff in an action for a malicious prosecution may not have been actually acquitted of the offense originally alleged against him, he may still maintain his action, provided he has been discharged, and allowed to go without day in the original action or if the order of the court has been such as to amount to a discharge." This decision is cited as an authority and expressly approved in *Marcus v. Bernstein,* 117 N. C., 32, in an opinion written by *Faircloth, C. J.,* who says: "The essential thing is that the prosecution on which the action for damages is based should have come to an end. How it came to an end is not important to the party injured, for whether it ended in a verdict in his favor, or was quashed, or a *nol. pros.* was entered, he has been disgraced, imprisoned, and put to expense, and the difference in the cases is one of degree, affecting the amount of the recovery."

In *Wilkinson v. Wilkinson,* 159 N. C., 265, the question was presented whether a *nol. pros.* with leave, entered in a criminal action, by the solicitor for the State, was such a termination of the action, as would support an action for malicious prosecution, based upon said criminal action. It was contended by the defendant that this was not a sufficient determination of the criminal action to authorize the bringing of the action for malicious prosecution. It was said in the opinion written by *Walker, J.,* that this contention was based upon a misapprehension of the true reasons upon which *Hatch v. Cohen,* and *Marcus v. Bernstein,* cited in support of the contention, were decided. After discussing the distinction between a *nol. pros.* and a *nol. pros.* with leave, he says: "The suit is terminated as much by one form of entry as by the other, because in both the prisoner is discharged without day, and that seems to be the true test. In both he can be taken upon a fresh capias, in one by special order, and in the other under the general leave to issue. Our opinion is, therefore, against the defendant on this point."

In *Brinkley v. Knight,* 163 N. C., 195, the plaintiff, who had been arrested upon a criminal warrant, procured by the defendant, in January, 1911, was taken by the constable, who had arrested him, to the place fixed for the trial, at the hour set by the justice of the peace. At said date and place the parties were duly present with their witnesses. The justice of the peace, however, failed to appear. The constable, at the instance of counsel for plaintiff, made the announcement that "if any one desired to prosecute Brinkley, they must do so, or he would be released." The constable thereupon told Brinkley that he was released. The action for malicious prosecution was commenced on 7 February, 1911. It was held that in the absence of an order of the justice of the peace, terminating the criminal action, or of some unequivocal act of the prosecutor, or of lapse of time, it could not be considered that the criminal action had terminated prior to the commencement of the action for malicious prosecution.

Notwithstanding the absence of a formal order or judgment in the criminal action instituted by the issuance of the warrant upon which plaintiff was arrested, upon the authorities cited in this opinion, we must hold that there was evidence tending to show that said criminal action had terminated prior to the commencement of this action. The decision in *Brinkley v. Knight,* is not an authority to the contrary. The facts in that case are distinguishable from the facts in the instant case. There the discharge was ordered by the constable; here the plaintiff was discharged by the justice of the peace. In that case, the action for malicious prosecution was begun within less than thirty days after the discharge of the plaintiff; here more than seven months elapsed from the date of the discharge to the date on which the action was commenced. If it shall be contended in the instant case, that there was a continuance by the justice of the peace, with leave to summons the defendant to trial at a subsequent date, Rule 15 of the Rules of Practice, prescribed by statute—C. S., 1500—for the courts of justices of the peace, may be invoked in answer to such contention. Under this rule, no continuance by a justice of the peace of an action brought before him shall exceed thirty days.

There was error in allowing defendants' motion for judgment as of nonsuit, upon the ground that there was no evidence tending to show that the criminal prosecution had terminated prior to the commencement of the action for malicious prosecution. For this error the judgment must be

Reversed.

CENTRAL BANK AND TRUST COMPANY, COADMINISTRATOR OF THE ESTATE OF J. W. HIGGINS, DECEASED, v. BOARD OF COMMISSIONERS OF YANCEY COUNTY.

(Filed 23 May, 1928.)

1. **Executors and Administrators—Appointment—Only Clerks of Court May Appoint Administrator.**

The authority to appoint administrators for the estate of a deceased person is given to the clerk of the court of the proper county alone. C. S., 1.

2. **Trusts—Resulting Trusts—Person Named by Trial Court to Settle Estate According to Judgment is Trustee and Not Administrator.**

A consent judgment entered by the court in the action of the beneficiaries of a deceased person, some claiming under an alleged will and the others as heirs at law, disposing of the estate, and therein naming those to act thereunder, does not constitute those named therein as administrators, and they will be regarded as trustees or agencies to carry out the provisions of the consent judgment.

3. **Taxation — Exemptions — Charitable Organizations — Property Bequeathed to Charity and Held by Trustee Appointed by Court to Administer Estate.**

Where no administrator of a deceased intestate has been appointed by the clerk of the court, and some of the parties claim under an alleged will unprobated, and the others as heirs at law, and a consent judgment has been entered by the judge, disposing of the property which has been accomplished by certain persons designated in the judgment as administrators or commissioners, excepting certain notes to be collected for two religious and charitable organizations: *Held*, the proceeds are the undivided property of the designated organizations as tenants in common, C. S., 7768, 7901, subject to division by the commissioners appointed by the consent judgment, and is not subject to taxation, and when paid under protest may be recovered.

APPEAL by plaintiff from *McElroy, J.*, at March Term, 1928, of YANCEY. Reversed.

Action to recover the sum of $523.90 paid, under protest, by plaintiff as part of a tax levied by defendant, for the year 1926, upon certain notes in possession of plaintiff and another and held by them for collection and for payment in part to certain corporations, the sums so paid to be used by said corporations exclusively for religious and charitable purposes.

From judgment upon a statement of facts agreed, plaintiff appealed to the Supreme Court.

A. Hall Johnston for plaintiff.
G. D. Bailey and Watson, Hudgins, Watson & Fouts for defendants.

CONNOR, J. J. W. Higgins died in Yancey County, on or about 2 April, 1923. He left a large estate, consisting of both real and personal property. A controversy arose, with respect to this estate, between his heirs at law, of the one part, and the Children's Home, a corporation engaged in conducting a home for children under the auspices of the Western North Carolina Conference of the Methodist Episcopal Church, South, Rutherford College, Inc., and Thomas F. Higgins, of the other part. The heirs at law contended that said J. W. Higgins had died intestate, and procured the appointment of an administrator of the said J. W. Higgins, by the clerk of the Superior Court of Yancey County. The other parties to the controversy contended that the said J. W. Higgins had left a last will and testament, by which he had bequeathed and devised to them certain property. The litigation resulting from this controversy was ended by a consent judgment, by the terms of which it was ordered that there should be a joint administration of the estate, by Joseph A. Higgins, representing the heirs at law, and the plaintiff herein, representing the other parties to the litigation. It was further ordered that the said administrators should have power to administer the said estate, to the same extent, and with the same authority as if they had been originally appointed and qualified as such by the clerk of the Superior Court of Yancey County. Pursuant to the agreement of all parties to the litigation, and with their consent, it was ordered, adjudged and decreed that the heirs at law of J. W. Higgins were entitled to one-half of the estate of J. W. Higgins, deceased, and that the Children's Home, Inc., and the Western North Carolina Conference of the Methodist Episcopal Church, South, were entitled, each to one-fourth of said estate. It was further ordered that said estate should be distributed in accordance with the judgment.

Pursuant to the provisions of said consent judgment, the plaintiff, and Joseph A. Higgins have proceeded with the administration and settlement of the estate of J. W. Higgins, deceased; they have distributed all the assets of said estate, which have come into their hands, in accordance with the terms of said judgment, except certain notes, which they now hold for collection. The Children's Home, Inc., and the Western North Carolina Conference of the Methodist Episcopal Church, South, by the terms of the consent judgment, are entitled to one-half of all said notes. One-half of the proceeds of the collection of said notes will be paid by plaintiff and the said Joseph A. Higgins to the said corporations. Both the Children's Home, Inc., and the Western North Carolina Conference of the Methodist Episcopal Church, South, are religious and charitable institutions; the money derived from the collection of said notes, and paid to them will be used exclusively for religious and charitable purposes. The notes now in the possession of plaintiff and Joseph A. Higgins, are held by them solely for collection, and distribution under the terms of the consent judgment. They are the only remaining assets of the estate of J. W. Higgins, all the other assets, both real and personal, of said estate, having been heretofore distributed in accordance with the terms of the judgment.

The defendant, the board of commissioners of Yancey County, levied a tax for the year 1926 upon the notes now in possession of plaintiff and Joseph A. Higgins, and held by them as aforesaid. Joseph A. Higgins, representing the owners of one-half of said notes, paid the sum of $523.90, this sum being one-half of the amount levied by defendant as the tax on said notes. Plaintiff, representing the owners of the other half of said notes, paid the remaining half of said tax, to wit, the sum of $523.90, protesting, however, at the time of such payment, that the interest in said notes, which it represented, was exempt, by statute, from taxation, for the reason that said interest was owned by the Children's Home, Inc., and the Western North Carolina Conference of the Methodist Episcopal Church, South, for religious and charitable purposes only.

This action was thereafter brought by plaintiff, within the time prescribed by statute, for the recovery of the sum of $523.90, the amount of the tax paid by it, under protest, the same being one-half the amount levied by defendant as a tax upon the notes in the possession of plaintiff and Joseph A. Higgins. The action was heard upon a statement of facts agreed. From judgment that plaintiff is not entitled to recover, and that it take nothing by this action, for the reason that the tax was lawfully levied and collected, plaintiff appealed to this Court.

While plaintiff and Joseph A. Higgins are designated as administrators of J. W. Higgins, deceased, in the consent judgment, by which they were authorized and empowered to take into their possession the assets of his estate, and to distribute said assets, in accordance with the agreement of the parties, as set out in the judgment, they are not, strictly speaking, administrators; they are, rather, receivers, appointed by the court, with the consent of the parties, to carry out the provisions of the judgment, with respect to the distribution of the assets of the estate of J. W. Higgins. The judgment was rendered by the Superior Court in term time; it was signed by the judge presiding. Jurisdiction to appoint an administrator of a deceased person, who has died intestate, and to issue letters for the administration of his estate is conferred by statute exclusively upon the clerk of the Superior Court of the county in which decedent was domiciled at or immediately previous to his death. C. S., 1. The powers and authority conferred upon plaintiff and Joseph A. Higgins, by the judgment, exceed the power of an administrator, as prescribed by statute. They were authorized and empowered "either as administrators or as commissioners to sell for cash or otherwise, either at public or private sale, as they jointly may determine, any of the property belonging to the estate of J. W. Higgins, either real or personal, and whether located in the State of North Carolina, the State of Tennessee, or elsewhere, and to execute good and sufficient deeds or other instruments for the purpose of vesting a good and sufficient title, without further application to or order from any other court of North Carolina and the action of said administrators or commissioners in the premises and in the making of such sale and conveyance is hereby in all respects ratified and confirmed."

The beneficial title to the notes now in possession of plaintiff and Joseph A. Higgins, and upon which the defendant levied a tax for the year 1926, was not in them, jointly, as administrators; such title, as to one-half of said notes, was in the parties represented by Joseph A. Higgins, and as to the other half, in the parties represented by plaintiff. Under the terms of the judgment, the said Joseph A. Higgins and the plaintiff were authorized and empowered to collect said notes and to distribute the proceeds of such collection, one-half to the heirs at law of J. W. Higgins, and the remaining half to the Children's Home, Inc., and the Western North Carolina Conference of the Methodist Episcopal Church, South. For all purposes, except collection and distribution, the title to one-half of said notes, by virtue of the judgment, vested at once in the Children's Home, Inc., and the said Western North Carolina Conference. The said Children's Home, Inc., and the said conference, are the owners of an undivided one-half interest in said notes, and the heirs at law of J. W. Higgins, deceased, are the owners of the other undivided one-half interest in same. It is so adjudged in the consent judgment. Plaintiff and Joseph A. Higgins have possession of said notes, as agents, or trustees of the respective parties, and as receivers appointed by the court, with the consent of the parties, only for the purpose of collection and distribution.

The parties represented by plaintiff, and the parties represented by Joseph A. Higgins, respectively, derive their title to their respective undivided interests in said notes from the consent judgment; they do not derive title from plaintiff and the said Joseph A. Higgins, as administrators of J. W. Higgins. Under the terms of their agreement as set out in the consent judgment, they are the owners of said notes, as tenants in common, and as such are entitled to have partition. C. S., 3253. By consent, the partition is to be made by plaintiff and Joseph A. Higgins, who are designated in the judgment both as administrators and as commissioners.

Upon the facts agreed, and under the statutes of this State—C. S., 7768 and C. S., 7901—the undivided one-half interest in said notes, owned by the Children's Home, Inc., and the Western North Carolina Conference of the Methodist Episcopal Church, South, exclusively for religious and charitable purposes, was exempt from taxation, at the time the tax was levied, and at the time one-half of said tax was paid by plaintiff. There is error in the judgment holding to the contrary. Judgment should be entered that plaintiff recover of defendant the sum of $523.90 with interest and costs. The judgment from which plaintiff appealed to this Court is

Reversed.

J. H. WILLIAMS v. FREDERICKSON MOTOR EXPRESS LINES, INCORPORATED, AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 23 May, 1928.)

1. **Bus Lines—Actions for Negligence—Parties—Principal and Surety—Statutes—Pleadings—Demurrer.**

   Under the provisions of the statute of 1925, chap. 50, secs. 3, 6(g) requiring public-service bus lines to give bonds indemnifying passengers and the public against negligent injury and property loss, as amended by Public Laws of 1927, chap. 136, sec. 6, providing that "in any action in the courts arising out of damage to person or property, the assurer shall not be joined in an action against the assured, but the assurer shall be liable within the limits of the bond," etc., *Held:* a joinder of the assurer in the action is forbidden, and the complaint will be dismissed upon demurrer.

2. **Constitutional Law—Obligation of Contracts—Change of Procedure Does Not Impair Obligation of Contract—Bus Lines.**

   The statute of 1927, amending the Public Laws of 1925, prohibiting the joinder of the assurer in an action against the assured, relates to the remedy, and its enforcement does not impair the obligations of a continuing contract of indemnity when the injury in suit occurs after the time the act of 1927 went into effect.

STACY, C. J., not sitting.

APPEAL by defendants from *Harding, J.*, from order rendered 13 February, 1928, of MECKLENBURG. Reversed.

D. B. Smith and James A. Lockhart for plaintiff.

John M. Robinson, Thaddeus A. Adams and S. E. Vest for defendants.

CLARKSON, J. This is an action for actionable negligence instituted by plaintiff against the Frederickson Motor Express Lines, Inc., and the United States Fidelity and Guaranty Company.

It is alleged in the complaint: "The defendant, the United States Fidelity Company, is, and at the time of the matters hereinafter alleged, was a corporation having its principal office in the city of Baltimore, State of Maryland, and duly licensed to engage in the business in the State of North Carolina, and to issue and become bound upon bonds and policies of casualty, accident and indemnity insurance, and particularly upon that class of bonds required by chapter 50, Public Laws of North Carolina, 1925. That in accordance with the provisions of chapter 50 of Public Laws of North Carolina of 1925, the defendant, United States Fidelity and Guaranty Company, on 7 May, 1927, issued its bond or policy of insurance for the protection of the public against injuries received through the negligence of its codefendant, which said bond or policy of insurance was in force at the time of the matters herein complained of and covered the motor truck of its codefendant, which said motor truck is hereinafter referred to."

The defendant demurred on the ground that this joinder was prohibited by section 6 of chapter 136 of the Public Laws of 1927. The court below overruled the demurrer, and the defendants appealed to this Court. We think the demurrer should have been sustained.

This Court in *Harrison v. Transit Co.,* 192 N. C., p. 545, in construing Public Laws 1925, ch. 50, sec. 3, 6(g), said, at p. 547: "But under our statute, which is made a part of the bond or policy, a judgment against the carrier is not prerequisite to a suit on the bond. The Legislature no doubt intended to obviate the necessity of double litigation, for it provided that a carrier by automobile should give a bond in a surety company in an amount to be fixed by the Corporation Commission (unless in lieu thereof national, State, county, or municipal bonds were given), conditioned to indemnify the public as well as passengers receiving personal injuries by any act of negligence, and that this bond should be for the benefit of and subject to action thereon by any person protected thereby who has sustained actionable injury. The carrier and the surety company are thus made jointly liable for the actionable negligence of the assured."

Public Laws 1927, chap. 136, sec. 6, which, after prescribing that the commission shall, in granting franchise certificate to operate passenger and freight motor lines, and providing for requiring such applicants to procure and file with the commission proper liability and property damage insurance, insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by the applicant upon the public highways of the

State, etc., provides: *"In any action in the courts arising out of damage to person or property, the assurer shall not be joined in the action against the assured; but upon final judgment against the assured, the assurer shall be liable within the limitations of the policy for the amount recovered and all the court costs."* (Italics ours.)

It seems that the Legislature enacted the above provision to meet the decision in the *Harrison case, supra,* and we must so hold.

Said Public Laws 1927, chap. 136, sec. 20, is as follows: "That all acts or parts of acts in conflict with or inconsistent herewith are hereby repealed to the extent of said conflict or inconsistency; but nothing herein contained shall be construed to relieve any motor vehicle carrier, as herein defined, from any regulation otherwise imposed by law or lawful authority; neither shall this act be construed to affect any obligation arising under duty imposed by nor right of action accruing under chapter fifty, Public Laws of one thousand nine hundred and twenty-five, and amendments thereto. (Sec. 22.) That this act shall be in full force and effect from and after June thirtieth, one thousand nine hundred and twenty-seven."

The summons in the present action was issued 3 January, 1928, and the complaint was verified on the same day. The allegation in the complaint was to the effect that the occurrence or injury upon which the present action was based took place on 26 November, 1927. The bond by defendant Guaranty Company was given 7 May, 1927, and was a "continuing contract." *White Co. v. Hickory, ante* 42. The occurrence, or injury, took place, and the suit was brought, after the act of 1927, chapter 136, went into effect on 30 June, 1927.

In *Graves v. Howard,* 159 N. C., at p. 602, quoting in part from Cooley Const. Lim., 402, it is said: "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy." *Dunn v. Jones, ante,* 354; *Brown v. Auto Service Co., ante,* 647.

Under the facts and circumstances of this case, we must hold that the statute prohibits the joinder of the assurer and the assured.

For the reason given, the judgment of the court below must be
Reversed.

STACY, C. J., not sitting.

WYTHE M. PEYTON v. WILLIAM RAY GRIFFIN ET AL.

(Filed 6 June, 1928.)

1. **Fraud—Elements of Fraud—Misrepresentation Alone Insufficient.**

   Where one acting for the sale of land for the owners has informed the prospective purchaser that he had not been upon the *locus in quo* previously, and gives mistaken boundaries, which thereafter the proposed purchaser has had ample opportunity to verify, the mere fact of the misrepresentation is not sufficient, in the action by the holder of a note for a part of the purchase money, to raise the issue of fraud set up in defense to the action.

2. **Same—Burden of Proof.**

   The burden of proof is on defendant to show fraud as a defense to an action upon his note when this is relied upon by him.

CIVIL ACTION before *Moore, J.*, at January Term, 1928, of BUNCOMBE.

The evidence tended to show that Roberts and Sumner owned certain land in Henderson County, containing about 486 acres, the Roberts tract containing 173 acres and the Sumner tract 313 acres. These two land owners had given an option on their property to one R. E. Burton. The price named in the option for the Roberts land was $600 per acre, and for the Sumner land $100 per acre. On or about 7 October, 1925, the plaintiff Peyton at a meeting of the Kiwanis Club of which the defendant William Ray Griffin was a member, stated that the reason that he was late at the meeting was because of the fact that he had been out showing "a wonderfully beautiful tract of land that afternoon or had been out to see it, and told of its beauty being almost unsurpassed." This statement was not made to the defendant particularly but to all members present. After the meeting the defendant Griffin intimated to the plaintiff Peyton that he might be interested in the purchase of the property. It was agreed that they would visit the property the next morning. The plaintiff and the defendant Griffin went out to view the land according to agreement. The defendant, in relating the conversation upon the land with respect to its boundaries, said: "I asked Mr. Peyton if it goes over that mountain and he said, 'It goes half way up, and it goes around still further four or five degrees from that particular point, I guess, and it reached almost to the top of the mountain and came down to the beginning, which is further up there perhaps a half mile.' . . . The land that he pointed out to me lay in a compact body. . . . As to my knowledge of that land as to how it lay at the time we closed the deal outside of the information I had gotten from Peyton, I took his word for it. He took me there and showed me the land and pointed out the boundaries definitely to me. I had not been on the land with any other person before I made the contract with him, and had no information about the lay of the land, as to where it was, except what I got from him. I drove out there three or four times passing by and talked to Mr. Roberts about it, but was not concerned about the boundaries any way at all, because I knew that I knew the boundaries if Peyton told me the truth and I presumed he had. . . . I did not ask information from Mr. Roberts or any other person as to how the land lay, because I thought I knew about it. I thought I knew because Peyton showed it to me and pointed it out definitely. . . . Wythe Peyton pointed out the lands as we could see it. He pointed it out on the mountain, three-quarters of a mile away. He pointed where the boundary line went. Pointed where the boundary line went three-quarters away, and said it went half way up the mountain. . . . He pointed out the improper location of the Roberts tract. . . . All I was concerned about was in the profits I would make, about the land I was to get, but I knew if the men pointed them out correctly. It makes no difference that I know that Mr. Peyton told me that he had not been on the land prior to the day before he took me there. He pointed them out to me. It makes no difference that I know of all that he knew about it was that he said Mr. Burton told him about it when he put the land in his hands the day before, and that I knew that he had not been in three-quarters of a mile of the land. He pointed out to me where the boundary lines were."

Thereafter on or about 9 January, 1926, the defendants received a deed for the property directly from Roberts and Sumner and executed deeds of trust to the owners to secure the balance of the purchase money, and also executed certain notes payable to Burton, the owner of the option, for profit or commissions in making the sale. Some of these notes were transferred by Burton to the plaintiff, and one of the notes so transferred is the basis of the present action. Under the agreement the defendant was to pay the sum of $380 per acre for all the land owned by both Roberts and Sumner. There is no suggestion that the description of the land in the deed from the owners, to wit, Roberts and Sumner, to the plaintiff was defective or did not disclose the correct boundaries of the land. The defendant, however, testified that in April, 1926, he received a map of the land and discovered for the first time that the Sumner land crossed the mountain and was practically worthless for development purposes. Upon making this discovery the defendant went to see the plaintiff Peyton and Peyton stated that "he was sorry, that the land was not what he thought it was." I asked him what he was going to do about it, and he said he "couldn't do anything." The defendant, William Ray Griffin, who conducted the negotiations for the purchase, was an intelligent man and had bought and sold several tracts of land in and about Asheville. The defendant admitted the execution of the note and pleaded fraud and therefore assumed the burden of proceeding with the proof. At the conclusion of defendant's testimony the trial judge held "that the defendants have not shown sufficient evidence of fraud to go to the jury," and instructed the jury to answer the issue of fraud in the negative.

From judgment rendered the defendants appealed.

Bourne, Parker & Jones and J. E. Swain for plaintiff.

Carter & Carter, J. W. Pless and Merrimon, Adams & Adams for defendants.

BROGDEN, J. The only question presented by the record is whether or not there was sufficient evidence of fraud to be submitted to the jury. The defendants seek to avoid the payment of the notes in controversy upon the ground that the plaintiff Peyton falsely and fraudulently misrepresented boundaries of land in controversy, and pointed out to defendants a false location thereof with intent to cheat and defraud them. The principles of law involved in the case are clear and undisputed. The main difficulty consists in the application of well established principles to the facts disclosed by the record. "The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss." *Electric Co. v. Morrison,* 194 N. C., 316. It is also well established that "if the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party cannot have redress, if he fail to avail himself of the sources of information which he may readily reach, unless he has been prevented from making proper inquiry, by some artifice or contrivance of the other party." *Walsh v. Hall,* 66 N. C., 239; *May v. Loomis,* 140 N. C., 350, 52 S. E., 728; *Tarault v. Seip,* 158 N. C., 363, 74 S. E., 3; *Furst v. Merritt,* 190 N. C., 397, 130 S. E., 40. Furthermore in *Tarault v. Seip,* 158 N. C., 363, 74 S. E., 3, the Court said: "That he made a mistake is not sufficient. Erroneous statements made by the vendor in the sale of land as to the location of a boundary are not sufficient, standing alone, to impeach the transaction for fraud." Again in *Gatlin v. Harrell,* 108 N. C., 485, 13 S. E., 190, the Court considered the question of fraud involved in pointing out the boundaries of land. The Court said: "The whole of the evidence accepted as true did not in any reasonable view of it prove the alleged fraud and deceit. The proof was that the defendants pointed out to the plaintiff certain corners and line trees and lines of the tract so sold, and that these or some of them were not the true ones; but there is nothing to prove that the defendants knew that they were not the true ones, nor that they fraudulently intended to mislead, deceive and get advantage of the *feme* plaintiff." *Ramsey v. Wallace,* 100 N. C., 75, 6 S. E., 638; *Pate v. Blades,* 163 N. C., 267, 79 S. E., 608; *Pritchard v. Dailey,* 168 N. C., 330, 84 S. E., 392; *Pridgen v. Long,* 177 N. C., 189, 98 S. E., 451; *Evans v. Davis,* 186 N. C., 42, 118 S. E., 845. The whole subject is discussed in an extensive annotation to the case of *Lynch v. Palmer,* 33 A. L. R., 842.

Applying these principles of law to the case at bar, it appears that the plaintiff was employed by Burton to sell the land the day before he mentioned the beauty of the premises at the meeting of the Kiwanis Club. It also appears from the evidence that Peyton told the defendant Griffin that he had not been on the land prior to the day before he took him to view the premises. It further appears that the defendants were informed that all the plaintiff knew about it was what had been told him by Burton. The plaintiff Peyton made no positive statement or declaration as to whether he knew the boundaries of the land or not. He undertook to point out the boundaries to the defendants when the parties were three-quarters of a mile away. The defendants had from 7 October, when the land was pointed out, until 9 January, when the deeds were delivered, to make a closer inspection of the land if they so desired. They knew that the land did not belong to the plaintiff or to Burton, but that the land, in contemplation of purchase, was the Roberts land and the Sumner land. The owners of the land were therefore plainly identified, and the fact that the plaintiff had no personal knowledge of the boundaries plainly disclosed. Furthermore in January deeds, apparently containing a proper description of the land, were executed and delivered by the owners to the defendant. All information therefore concerning the proper boundaries was then presently available.

After reviewing the evidence, with the liberality which the law requires, we are constrained to hold that upon the whole record there is no evidence of fraud warranting the submission of such an issue to the jury.

Affirmed.

WILLIAM RAY GRIFFIN AND M. A. GRIFFIN v. WYTHE M. PEYTON, R. E. BURTON, HARRY M. ROBERTS AND J. P. RANDOLPH.

(Filed 6 June, 1928.)

For digest see *Peyton v. Griffin, ante,* 685.

CIVIL ACTION before *Moore, J.,* heard at Chambers in Asheville, 19 January, 1928.

The plaintiffs in this action are the defendants in the case of *Peyton v. Griffin, ante,* 685. Plaintiffs instituted an action against the defendants for damages for fraud, alleging that the defendant Peyton falsely and fraudulently pointed out the boundaries of certain lands which the plaintiffs purchased. Plaintiffs also ask for a cancellation of all notes issued in payment of commissions or profits and for an injunction restraining the defendants from prosecuting the action instituted by them against the plaintiffs. The trial judge was of the opinion that the plaintiffs were not entitled to the relief prayed for and denied the motion. Plaintiffs appeal.

Merrimon, Adams & Adams, J. W. Pless and Carter & Carter for plaintiffs.

Bourne, Parker & Jones and J. E. Swain for defendants.

BROGDEN, J. This is a companion case to *Peyton v. Griffin, ante,* 685. It appears from the record in *Peyton v. Griffin* that a stipulation was entered into by counsel providing among other things "that the issue of fraud raised by the defendants in their answer and further defense shall be determinative of the issue of fraud set up and alleged as to all the outstanding notes of said series executed by the said William Ray Griffin and M. A. Griffin in whomsoever hands they may be and in whatsoever court said action is pending; but it is distinctly understood and agreed that the issue of innocent holder for value without notice is not to be determined by the answer to the issue of fraud in this case."

It appearing, therefore, that the parties have agreed to abide the determination as to the issue of fraud in the case of *Peyton v. Griffin, supra,* with respect to all notes issued by Griffin in payment of commissions and profits in purchasing the land in controversy, it becomes unnecessary to discuss the questions involved in this case.

Affirmed.

CHARLOTTE CONSOLIDATED CONSTRUCTION COMPANY ET AL. v. MRS. E. L. COBB (MRS. F. G. COBB), ET AL.

(Filed 6 June, 1928.)

1. **Deeds and Conveyances—Construction and Operation—Restrictions.**

A restricted covenant in a deed to lands divided into lots requiring that the lots conveyed "shall be used for residential purposes only, and there shall not at any time be more than one residence or dwelling-house" thereon, evidences the intent of the grantor to exclude all buildings thereon other than dwelling-houses, but does not exclude apartment houses so arranged that several families may reside separately in the various apartments in the same building and under the same roof.

2. **Same—General Rules of Construing Restrictions.**

In construing restrictive covenants in a deed as to the character of the buildings that may be erected on a lot sold, with others, in the development of an area of lands, the courts will incline to such reasonable construction as will resolve a doubt in favor of the free and untrammeled use of the property for lawful purposes.

APPEAL by plaintiffs from *Harding, J.*, at March Special Term, 1928, of MECKLENBURG.

Civil action to enjoin the erection of an apartment house on defendant's lot as being in violation of restrictive covenants contained in deeds conveying said property.

The material allegations of the complaint, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. In 1920, the Charlotte Consolidated Construction Company, being the owner of an undeveloped tract of land in that section of the city of Charlotte known as "Dilworth," decided to divide the same into lots and blocks of various sizes and develop it as a high-class residential district.

2. To this end, a map was prepared and recorded, showing the general plan and scheme, and all the lots were sold with certain restrictions relative to their use and occupancy, chief among which is the following:

"The lot of land hereby conveyed shall be used for residential purposes only, and not otherwise, and shall be owned, occupied and used only by members of the white race (domestic servants in the employ of said occupants excepted) and there shall not at any time be more than one residence or dwelling-house on said lot (servants' house excepted)."

3. Said restrictions were inserted in all the deeds conveying the different lots shown upon the map, as covenants running with the land, for the mutual benefit and protection of the respective owners thereof.

4. The corporate plaintiff is not now the owner of any of the lots shown upon said map, but does own property surrounding and in the

same neighborhood, while the individual plaintiffs are owners of lots appearing thereon, two of them adjoining the defendant's lot.

5. The defendant, Mrs. E. L. Cobb, is the owner of one of the lots shown upon said map and proposes to erect thereon, as plaintiffs allege, "a large flat or apartment house of a severe oblong shape, to be used for the separate accommodation of four different families or family groups, said buildings being arranged into four distinct separate places of residence, or apartments, each of said apartments having its own separate kitchen and other quarters, each being entirely separate from the other, each having its own separate front porch and each having its own private inside entrance with no means of communication one with another, except through such inside main entrance to each."

6. None of the plaintiffs, nor any of the owners of lots shown upon the aforesaid map, has consented for the defendant to build such an apartment house on her property, nor has any of the plaintiffs or any of said lot owners waived the right to protest against a violation of any of said restrictive covenants.

7. The erection of said apartment house, plaintiffs allege, will result in irreparable injury to their property; wherefore, they ask that its construction be enjoined.

A demurrer was interposed by the defendants upon two grounds:

First, because no cause of action is stated by the individual plaintiffs, it appearing that the deed of the Construction Company to the lot in question, attached to the complaint, contains the following reservation:

"Provided, however, that any of the conditions and restrictions herein contained may be at any time and in any manner changed by and with the mutual and written consent of the parties of the first part, or its successors, and the owner or owners, for the time being, of the lot of land hereby conveyed."

Second, for that the complaint does not state facts sufficient to constitute a cause of action, either against the defendants, or in favor of any of the plaintiffs.

From a judgment sustaining the demurrer, the plaintiffs appeal, assigning error.

Taliaferro & Clarkson for plaintiffs.
Whitlock, Dockery & Shaw and T. A. Adams for defendant.

STACY, C. J., after stating the case: The principal question for decision is whether a building restriction in a deed which provides that the lot of land thereby conveyed "shall be used for residential purposes only . . . and there shall not at any time be more than one residence or dwelling-house on said lot (servants' house excepted)," is violated by the erection on said premises of an apartment house containing four apartments, each designed for the separate accommodation of a family or family group.

The plaintiffs assert the affirmative of this question and rely upon *Bailey v. Jackson,* 191 N. C., 61, 131 S. E., 567, where the covenant, among other things, prohibited the building of more than "one residence" on a lot. The defendants assert the negative and cite as authority *Delaney v. VanNess,* 193 N. C., 721, 138 S. E., 28, where an apartment house was held not to violate a covenant against the erection of "any structure except a dwelling-house"; because, it was said, an apartment house, used for residential purposes, is a dwelling-house.

Conceding, then, that an apartment house may be more than one residence, is it more than "one residence or dwelling-house" when used for residential purposes only?

The trial court was of opinion, and accordingly held, that the restriction in question did not prohibit the erection of an apartment house such as the defendant proposes to build. In this, we are disposed to concur.

An apartment house, used for residential purposes only, has been held to be a dwelling-house, hence if the expression "dwelling-house" be changed to one of its equivalents, "apartment house," the restriction would then read: there shall not at any time be more than one residence or apartment house on said lot (servants' house excepted). If this were its language, and such we apprehend is one of its permissible meanings, the correctness of his Honor's ruling would hardly be subject to debate.

Residence is a more restricted term than dwelling-house, and it would seem to be a refinement of construction to say that the two words, as here employed, were used synonymously, *idem re et sensu.* Rather it would appear that the second, which has the broader signification, was intended as an enlargement over the first. *Hutchison v. Ulrich,* 145 Ill., 336, 34 N. E., 556, 21 L. R. A., 391; 18 C. J., 391. If the parties had wished to prohibit the building of an apartment house on the defendant's lot, they could easily have said so in language clearly importing such intent.

It is the position of a number of courts that, in the absence of clear and unequivocal expressions, restrictive covenants ought not to be expanded, but rather buckled in against those claiming their benefit and in favor of free and unrestricted use of property. 27 R. C. L., 756, *et seq.* "It is a well settled rule that, in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed, all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee." *Hunt v. Held,* 90 Ohio, St., 280, 107 N. E., 765, L. R. A., 1915 D., 543.

We think the restriction in question is aimed more at the character of the building with reference to the purposes for which it is to be used, than at its architectural design. A building occupied by four families is no less a dwelling-house than one occupied by a single family. The house is not necessarily doubled, trebled or quadrupled simply because it is occupied by two, three or four families, instead of one.

Speaking to a similar question in *McMurtry v. Phillips Invest. Co.*, 103 Ky., 308, 45 S. W., 96, 40 L. R. A., 489, *Hazelrigg, J.*, delivering the opinion of the Court, said: "It is shown, indeed admitted, that these different apartments or flats are places for persons to reside in, but it is contended that the language of the restriction conveys the idea of a single residence for a single family or at any rate excludes the idea of a number of residences under the same roof or in the same house. We think, however, that to give the language used, this meaning would be to extend its scope beyond the expressed intention of the parties. The purposes for which the house is to be erected on the court were to be used were 'residence purposes only.' And as the house in controversy is to be constructed for such purpose only and is not to be used for any other purpose, we do not think its construction is at all prohibited by this restriction clause. If the intention had been to permit the erection of only segregated private residences, the instrument would doubtless have so provided."

The building which the defendant proposes to erect is a single structure, intended for residential purposes only. This is permitted by the restriction which is directed against the erection on the *locus in quo* of more than one residence or dwelling-house. That it is intended to accommodate a number of families does not *ipso facto* bring it within what is forbidden. *Huntington v. Dennis, post,* 759.

Holding, as we do, that the complaint does not state facts sufficient to constitute a cause of action, it is needless to consider the other ground upon which the demurrer is based.

Affirmed.

ROYAL INSURANCE COMPANY ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 6 June, 1928.)

Evidence—Hearsay Evidence—Declarations Against Interest—Railroad—Insurance.

When insured goods have been destroyed by fire, and the owner has received payment for the loss from the insurance company, and the latter, under a writing of subrogation, brings action against a railroad for negligence in causing the loss, the admissions of the owner upon the issue of negligence involving the origin of the fire are incompetent when it clearly appears that he had no knowledge of the facts upon which his supposed admissions or declarations were predicated, and is in effect an opinion of a nonexpert witness upon which he is not qualified to give an opinion.

STACY, C. J., dissenting.

CIVIL ACTION before *Cranmer, J.*, at September Term, 1927, of SAMPSON.

There was allegation and proof to the effect that the plaintiff Royal Insurance Company issued to Bethune-Colwell and Company, a policy of fire insurance for the sum of $5,000, insuring against loss or damage by fire, cotton owned by the insured, and that the other plaintiff Home Insurance Company had issued a policy for the same amount to the same persons for the same purpose. That on 13 October, 1922, Bethune-Colwell and Company, who were cotton buyers in the town of Clinton, N. C., had purchased and placed upon the cotton platform on the defendant's right of way certain lint cotton of the value of $9,075.86, and that while said cotton was so stored on said platform the defendant about six or seven o'clock in the evening of Saturday backed a freight train into the said depot near said cotton platform and that the employees of defendant were cooking their supper in the caboose and using for such purpose a stove, and that fire and flames were negligently permitted to escape from said stove and to fall upon said cotton platform, setting fire thereto and completely destroying the same. That proof of loss was filed by said Bethune-Colwell and Company against the plaintiffs, and that the loss, amounting to $9,075.86, was paid to the owners of said cotton; that after the full payment of said loss by the plaintiffs the said Bethune-Colwell and Company, executed to each of the plaintiffs a subrogation agreement "and did assign, set over, transfer and subrogate to each of the plaintiffs, all the right, claims, interest choses or things in action," and authorized and empowered the plaintiffs and each of them to sue said defendants for the loss sustained for the destruction of said cotton. The defendant denied that it was guilty of any negligence.

The following issues were submitted to the jury:

"1. Was the cotton of Bethune-Colwell and Company, which was insured by the plaintiffs, and the loss therefor, paid for by them, burned by the negligence of the defendant, as alleged in the complaint?

"2. Was Bethune-Colwell and Company guilty of contributory negligence which contributed to the damages for which this action was brought to recover, as alleged in the answer?

"3. What damages, if any, are these plaintiffs entitled to recover?"

The jury answered the first issue "no," and did not answer the other issues.

From judgment upon the verdict in favor of defendant plaintiffs appealed.

Butler & Herring for plaintiffs.
Rountree & Carr and A. McL. Graham for defendant.

BROGDEN, J. Bethune-Colwell and Company, were the owners of the cotton destroyed by fire. On 8 July, 1925, after receiving payment, a subrogation receipt was signed and delivered to the plaintiffs by the owners of said cotton, and the plaintiffs, by virtue of said subrogation receipt and assignment, instituted this action against the defendant on 11 July, 1925. L. A. Bethune, one of the owners of the cotton, testified that his firm was required, under the terms of the contract of insurance, to sign a subrogation agreement, but that the subrogation paper first presented by the plaintiffs permitted the plaintiffs to bring suit in the name of the owners of the cotton, to wit, Bethune-Colwell and Company, and that the owners had declined to sign the receipt in that form. Thereupon the witness Bethune was asked the following question on cross-examination by counsel for defendant: "Q. Had you not stated that in your opinion, before that time, (that is the time of signing the subrogation receipt), that the railroad company was not responsible for this fire?" "A. I expressed the opinion that I did not think the railroad company burned it. Yes sir, I did that." The plaintiff objected to the question and moved to strike out the answer. The trial court admitted the evidence and the plaintiffs excepted.

The witness Bethune also testified as follows: "When I got there not all of the cotton was on fire. . . . I did not observe the condition at the cotton platform or on the track the day of the fire. . . . I got to the fire as quick as I could after the alarm was sounded. I do not know of my own knowledge how the fire occurred, I do not recall that I noticed the condition around the platform that particular day."

The plaintiff contends that the evidence is incompetent for the reason that it permitted a witness to give an opinion as to the cause or origin of the fire when the witness had no personal knowledge of the condition of the premises and was not present when the fire started. The defendant contends that the testimony is competent for the reason that it is a declaration against interest, which is one of the well defined and well established exceptions to the hearsay rule. One of the leading cases in this State, discussing declarations against interest, is *Smith v. Moore,* 142 N. C., 277. In that case *Walker, J.,* writing for the Court, said: "Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears: 1. That the declarant is dead. 2. That the declaration was against his pecuniary or proprietary interest. 3. That he had competent knowledge of the fact declared. 4. That he had no probable motive to falsify the fact declared." *Roe v. Journegan,* 175 N. C., 261; *Carr v. Bizzell,* 192 N. C., 212.

Without entering into any discussion of the complexities of declaration against interest, it is generally held to be the law that in order to make such declarations admissible in evidence the declarant must have a competent knowledge of the fact declared. In the case at bar the witness Bethune expressly testifies that he had no knowledge of the condition of the premises or of the origin of the fire. The cotton was burning when he arrived upon the scene. The evidence of the witness perhaps would be more in the nature of an admission. The difference between an admission and a declaration against interest is discussed by *Justice Allen* in *Roe v. Journigan, supra.* Of course, technically an admission is a statement of a party, and the witness Bethune was not a party to this action. He was, however, the assignor of the plaintiffs, and was therefore a privy in estate, and any competent declaration made by an assignor is admissible against the assignee, who holds title under him. *Guy v. Hall,* 7 N. C., 150; *Johnson v. Patterson,* 9 N. C., 184; *Satterwhite v. Hicks,* 44 N. C., 105; *McGee v. Blankenship,* 95 N. C., 568; *Shaffer v. Gaynor,* 117 N. C., 24; Wigmore on Evidence, 2d ed., Vol. 2, sec. 1080 *et seq.,* p. 593. But even an admission must be the acknowledgment of a fact and not of a mere opinion, having no foundation either in knowledge or from observation.

The whole question, therefore, is narrowed to the inquiry as to whether or not the opinion of the witness Bethune as to the origin of the fire was competent under the circumstances disclosed by the record. In *Hill v. R. R.,* 186 N. C., 475, this Court stated the law as follows: "In the law of evidence no principle is more familiar than that which ordinarily excludes the opinion of a nonexpert witness. One who is called to testify is generally restricted to proof of facts within his personal knowledge, and is not permitted to express his opinion concerning matters which the jury are required to decide. . . . The opinion of the witness should be based upon facts admitted or found, or upon his personal knowledge, and not upon the assumption of the fact."

The origin of the fire was the point in issue between the parties and was the identical question to be determined by the jury. The testimony was therefore incompetent and should have been excluded. *Summerlin v. R. R.,* 133 N. C., 551; *Marshall v. Telephone Co.,* 181 N. C., 292; *Stanley v. Lumber Co.,* 184 N. C., 307; *S. v. Brodie,* 190 N. C., 554; *Trust Co. v. Store Co.,* 193 N. C., 122; 154 N. C., 523.

New trial.

STACY, C. J., dissenting.

STATE ON RELATION OF F. G. GOWER v. C. W. CARTER.

(Filed 6 June, 1928.)

1. **Elections—Qualification of Voters—Residence.**

In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent, and not of a temporary character, corresponding with the word domicile.

2. **Same—Evidence of Residence.**

Those who are teachers in a locality, and their right to vote therein is made to depend upon whether they were residents therein only for the scholastic year. A question is incompetent that asks them of their intention to make the locality their legal residence, since the answer involves a question of law as to what constitutes a sufficient legal residence to qualify them to vote.

3. **Trial—Instructions—Request for Instructions.**

Correct prayers for instructions, refused by the court, are not considered as reversible error when they are substantially given in the general charge.

APPEAL by defendant from *Cranmer, J.*, at November Special Term, 1927, of JOHNSTON. No error.

Parker & Martin for plaintiff.
W. H. Lyon and J. W. Bailey for defendant.

ADAMS, J. This is an action in the nature of *quo warranto* to try the title to the office of mayor of the town of Clayton. The case was before the Court at the Fall Term, 1927, on appeal from a judgment of nonsuit, and is reported in 194 N. C., 293. On the second trial the following issue was submitted to the jury and answered in the affirmative: "Was F. G. Gower duly elected mayor of the town of Clayton on the third day of May, 1927, as alleged in the complaint?" Judgment was given for the plaintiff, and the defendant appealed.

It is admitted that the official returns show that 238 votes were cast for the plaintiff and 239 for the defendant. The plaintiff alleges, however, that the defendant received only 224 legal votes. This allegation is denied by the defendant, who says that several votes were wrongfully and illegally cast for the plaintiff, and that the defendant was duly elected to the contested office. It is necessary to examine these contentions in the light of the evidence.

The plaintiff contends that sixteen persons illegally voted for the defendant: Charles Hill, Jr., Joseph Romanos, Mrs. Forbes, and Misses Sitterson, McCook, Baugh, Baker, Pierce, Hampton, Noble, Baxley, Askew, Sparger, Herring, Banks, and Foy. It was admitted on the trial, as we understand from instructions given the jury, that Mrs. Forbes was under 21 years of age and that Romanos was a citizen of Syria, not of North Carolina, at the time they voted. They were therefore disqualified. C. S., 2654, 5936, 5937. Hill testified that he had lived in Clayton only three months before the election and that the defendant registered his name. For this reason he was not a qualified elector. C. S., 2654, 5937. The others whose names are given were teachers in the schools of Clayton. There was evidence tending to show that they remained there while the schools were in session and in vacation returned to their respective homes. The contested question is whether they were qualified to vote in the election for mayor.

The Constitution provides that every elector shall reside in the State of North Carolina for one year and in the precinct, ward, or other election district in which he offers to vote four months next preceding the election. Art. VI, sec. 2. In *Hannon v. Grizzard,* 89 N. C., 115, it is said: "Residence, as the word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicile, denoting a permanent as distinguished from a temporary dwelling place. There may be a residence for a specific purpose, as at summer or winter resorts, or to acquire an education, or some art or skill in which the *animus revertendi* accompanies the whole period of absence, and this is consistent with the retention of the original and permanent home, with all its incidental privileges and rights. Domicile is a legal word and differs in one respect, and perhaps in others, in that, it is never lost until a new one is acquired, while a person may cease to reside in one place and have no fixed habitation elsewhere." And in *Reynolds v. Cotton Mills,* 177 N. C., 412: "Domicile is of three sorts—domicile by birth or of origin, by choice, and by operation of law. The first is the common case of the place of birth; the second is that which is voluntarily acquired by a party; the last is consequential, as that of the wife arising from marriage. It is universally held, and clearly so by this Court, that in order to constitute a domicile by choice, two essential things must concur, which are 'residence' and 'intent' to remain at the place for an indefinite period."

Obviously for the purpose of meeting this requirement the defendant inquired of several of the teachers who had testified whether it was their purpose to make Clayton their legal residence when they went there and when they voted. The plaintiff's objection to those questions was sustained and the defendant excepted. Each witness would have given an affirmative answer. In this ruling there was no error. A legal residence, under the cases cited, was prerequisite to a right to vote. But the question was framed in such way as to involve matters of law as well as of fact and to leave with each witness the implied right to determine for herself what elements are essential to the correct definition of a legal residence. Each one might have concluded that her presence in Clayton during the school terms was sufficient to constitute a legal residence for the purpose of voting without an intent to remain there at any other time or for any longer period, or each one may have differed from the others in her estimate and understanding of the phrase. In the questions no rule was laid down or suggested as a basis for any fixed uniformity in giving an answer. Exceptions, 4, 11, 13, 14, 18-20, 22, 27, 29-31, 33 and 42 are overruled. Exceptions 16, 17, 32, 36, and 37 set forth no sufficient cause for a new trial; and as to those numbered 35, 38, and 39 it may be said that if the evidence had been admitted it could not, upon undisputed facts, reasonably have become a factor in changing the result.

The defendant requested the following instruction: "Domicile, or legal residence, is to be determined by the intent of the person under the facts and circumstances. The statute prescribes the time element necessary to qualify a voter in the matter of actual residence; but the test of domicile or legal residence is the intention of the person."

We think this prayer was given, not in the exact words, but at least in substance. After stating the time limit of the elector's residence as prescribed by statute and the requisites of registration, the trial court defined "citizen," "residence," and "domicile," and stressed the present intention as an essential element in the selection of one's domicile or permanent home. This was repeated and the intention which marks the distinction between domicile and residence was clearly pointed out. That a requested instruction need not literally be given needs no citation of authority. We find no reversible error.

No error.

GILARD BROWN, ADMINISTRATRIX OF THE ESTATE OF RUFUS EDWARDS, DECEASED, v. SOUTHERN RAILWAY COMPANY, A CORPORATION, AND ATLANTA AND CHARLOTTE AIRLINE RAILWAY COMPANY, A CORPORATION, AND W. D. TURNER.

(Filed 6 June, 1928.)

Negligence—Contributory Negligence—Infants—Railroad.

In an action against a railroad for the negligent killing of plaintiff's intestate, an instruction that a lad nearly eight years of age is incapable of being guilty of contributory negligence is reversible error, contributory negligence, in this case, being a question for the jury under the evidence as to the infant's ability to appreciate the danger and act accordingly for his own safety under the circumstances. *Ghorley v. R. R.*, 189 N. C., 634, cited and approved.

APPEAL by defendants from *Bowie, Special Judge,* and a jury, at July Special Term, 1927, of MECKLENBURG. New trial.

The allegations in plaintiff's complaint are as follows: "That just south of the intersection of the defendant companies' tracks with Second Street, a public thoroughfare, in the city of Charlotte, N. C., children of tender age were accustomed to and did cross frequently the tracks and premises of the defendant companies and did use, at the times hereinafter mentioned and for several years prior thereto, the tracks and premises of the said companies as a playground; that the engines, cars, tracks and other possessions of the defendant companies, the level condition of the premises and the various collection of pebbles and other objects on the said premises of the said companies allured and attracted children of tender age, along with the plaintiff's intestate, to and on the said premises and tracks of the said railroad companies; that the defendant companies knew, or by the exercise of reasonable care, ought to have known, that small children were allured and attracted by the said premises and possessions, and that said children so attracted and allured were incapable of caring for themselves amid moving engines and rolling stock and the various other inherently dangerous operations on the said premises; that, well knowing the dangerous conditions of the said premises and well knowing the uses thereof by children of tender age, at the times hereinafter mentioned and for many years prior thereto, the defendant companies, and each of them, failed, neglected and refused to erect a fence or to give signals or to put a guard there or to establish any sort of system of warning whatever that would put or tend to put children of tender age or any person on notice of the approach of locomotives and trains. That on or about 29 November, 1925, about three-thirty p. m., the plaintiff's intestate, who was about seven years of age, was crossing in an easterly direction along with other children, the eastern track of the defendant companies; that just as the said intestate reached the east rail of the east track an engine or train of the defendants in charge of W. D. Turner, defendant, while backing and going in a northerly direction, operated at a high, unlawful, reckless and dangerous rate of speed, without giving any warning or signal of any kind and without a watchman on the rear of the said train or engine and without keeping a proper lookout, ran over the said intestate and cut off his left leg between the knee and the ankle and crushed the right foot of the said intestate and otherwise bruised and lacerated said intestate."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff's intestate injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,000."

The exceptions and assignments of error and necessary facts will be stated in the opinion.

Preston & Ross for plaintiff.
John M. Robinson for defendants.

CLARKSON, J. At the close of plaintiff's evidence, defendants made a motion as in case of nonsuit, and at the close of all the evidence the motion was renewed. C. S., 567. The court below overruled the motions, defendants excepted and assigned error. We think the court below correct in the ruling. As oft repeated, the evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefits of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

As the case goes back for a new trial, we will not discuss the evidence, but, in our opinion, it is sufficient to be submitted to a jury.

Rufus Edwards, the boy that was killed by the defendant railroad company, on 29 November, 1925, was nearly eight years old. His mother testified that he would have been eight years old on 4 January, 1926.

The defendants, in their answer, plead contributory negligence. The court below charged the jury: "The court charges you that our courts have heretofore held that a child under eight years of age is incapable of committing contributory negligence." Defendants duly excepted and assigned error.

We think the present case is similar to and governed by the case of *Ghorley v. R. R.,* 189 N. C., at p. 635. It was there said: "It was earnestly insisted by defendants that, under the evidence, plaintiff's intestate, a child seven years of age, was guilty of contributory negligence in walking on defendant's track in front of a moving train, which caused her death, but we think the trial court was clearly correct in submitting the question to the jury, as he did. There was ample evidence to warrant the jury in finding that the engineer or fireman, in the exercise of reasonable care, could have seen, and should have seen, the little girl in time to have avoided the injury." *Alexander v. Statesville,* 165 N. C., 527; *Campbell v. Laundry,* 190 N. C., 649; *Hoggard v. R. R.,* 194 N. C., 256.

Chief Justice Clark wrote the opinion relied on by plaintiff in *Ashby v. R. R.,* 172 N. C., 98. The headnote 2, gives the reason: "A lad 8 years of age, injured while assisting, at their request, the defendant's employees in pushing a car loaded with cross-ties, and injured while endeavoring to jump on the car and ride across a cattle-guard, was too young to be guilty of contributory negligence under the facts of this case." That case was different from the present one.

The learned *Chief Justice*, in the concurring opinion, in *Fry v. Utilities Co.,* 183 N. C., at p. 296-7, says: "In *Baker v. R. R.,* 150 N. C., 565, above cited, this Court, in discussing the question of contributory negligence, and whether it was a question for the court or the jury, says: 'The responsibilities of infants are clearly defined by text-writers and courts. At common law, fourteen was the age of discretion in males and twelve in females. At fourteen an infant could choose a guardian and contract a valid marriage. After seven, an infant may commit a felony, although there is a presumption in his favor which may, however, be rebutted. But after fourteen an infant is held to the same responsibility for crime as an adult.' And then this opinion adds almost in the same words of the later case of *Foard v. Power Co.,* 170 N. C., 48, as follows: 'We find in the books many cases where children of various ages, from seven upward, have been denied a recovery because of their own negligence.'" The learned *Chief Justice* then cites the *Alexander case, supra,* and other cases bearing on the subject. We refer to the cases cited for further discussion. For the reasons given, there must be a

New trial.

SHAPLEIGH HARDWARE COMPANY v. FARMERS FEDERATION, INC.

(Filed 6 June, 1928.)

Accord and Satisfaction—Nature of Agreement—Accepting Check in Payment of Disputed Sum—Sales.

When the purchaser claims a reduction from the purchase price of the goods sold and delivered in consequence of an alleged inferiority of quality, deducting the amount of the damages claimed, and sends a check in a less sum than that demanded by the seller, with a letter stating that the check was in full, a controversy arises between them as to the correct amount due, and the acceptance of the check and receiving the money thereon is a valid settlement, binding upon the seller.

CIVIL ACTION before *Schenck, J.,* at November Special Term, 1927, of BUNCOMBE.

The evidence tended to show that in the fall of 1925, a traveling salesman and agent of the plaintiff sold to the defendant a certain lot of automobile tires. The salesman represented the tires to be the best line put on the market by the plaintiff, and that "they would rank with anything that was being sold on the market as to quality and workmanship," and that they were "as good ones as anything on the market." After the purchase had been made and the tires delivered the defendant sold the tires to various customers. Soon complaints began to be made to the defendant with respect to the quality of the tires. There was testimony adduced in behalf of the defendant that on several occasions complaint had been made to the agent that the tires were not giving satisfaction and that as a matter of fact seventy-five per cent of the tires sold by the defendant were returned by the purchasers. Thereafter on 21 June, 1926, the defendant wrote a letter to the plaintiff at St. Louis, Missouri, in which letter it was stated, "He also wants to get in touch with your salesman relative to a discount on these tires before the check is mailed." Plaintiff acknowledged receipt of this letter on 24 June, stating, "We consider that while the matter of tires is being investigated we should be favored with a good substantial remittance to apply on account—say a check for at least $2,500 or $3,000," etc. Thereupon on 14 August, 1926, the defendant wrote the following letter to the plaintiff: "You will please find enclosed complete settlement of our account to date, with the exception of one invoice of $110 covering shipment of knives made to our Fletcher warehouse, which is not due until 1 January, 1927. This account we will settle promptly when due. We are returning what tires and tubes we had on hand by freight. You will note from our invoice enclosed, that we have invoiced them back to you at same prices that they were invoiced to us. There were 108 tires and 108 tubes as per invoice enclosed, amounting to $1,426.37. You will also note an exhibit

of invoice due you in the amount of	$4,115.87
Tires returned	1,426.37
Less credit memorandum	22.00
	$2,667.50
Less freight credit	.26
	$2,667.24

"You will find checks enclosed which total the amount of $2,667.24. This completes the settlement with the exception of the one invoice mentioned above.

"Trusting that you find this satisfactory, we are, sincerely yours, Farmers Federation, Inc., W. Z. Penland, assistant secretary and treasurer."

Three checks aggregating $2,667.24 referred to in said letter and enclosed therein, were received by the plaintiff, endorsed and collected. However, on 18 August, the plaintiff wired the defendant that it could not accept the tires.

The plaintiff brought this suit against the defendant alleging that the defendant was indebted to it in the sum of $1,681.81. The defendant pleaded accord and satisfaction arising from the return of the merchandise and the cashing of the checks referred to in the letter of 14 August. The evidence of the plaintiff is not set out in full in the record, but the record does disclose that "plaintiff thereupon introduced evidence tending to contradict all of the material evidence offered by the defendant, but which is not deemed pertinent upon this appeal, since by the subsequent ruling of the court the jury was not permitted to pass upon the evidence in the case."

At the conclusion of all the testimony the trial judge nonsuited the counterclaim set up by the defendant and directed a verdict against the defendant for the sum alleged in the complaint, from which judgment the defendant appealed, assigning error.

Lee, Ford & Coxe for plaintiff.
Carter & Carter for defendant.

BROGDEN, J. In *Ore Co. v. Powers,* 130 N. C., 152, 41 S. E., 6, the debtor sent a check to a creditor by letter which stated: "We enclose you check for $3,210.46 which balances account with your good self." This Court upon such fact declared the law to be: "Having accepted the check with a statement in the letter that it was for balance in full and cashed the check, the plaintiff is bound thereby in the absence of evidence of fraud or other conduct on the part of the defendants to relieve the plaintiff from the effect of its acceptance of the check in full payment." *Thomas v. Gwyn,* 131 N. C., 460, 42 S. E., 904; *Armstrong v. Lonon,* 149 N. C., 434, 63 S. E., 1011; *Aydlett v. Brown,* 153 N. C., 334, 69 S. E., 243.

It will be observed that the *Powers case, supra,* and the case of *Kerr v. Sanders,* 122 N. C., 635, 29 S. E., 943, and that line of cases, contain no reference to a disputed account. Dispute as an essential element of accord and satisfaction in such cases apparently appeared in the law for the first time in the case of *Rosser v. Bynum,* 168 N. C., 340, 84 S. E., 393, and later followed in *Bogert v. Mfg. Co.,* 172 N. C., 248, 90 S. E., 208, and cases subsequent thereto. *Supply Co. v. Watt,* 181 N. C., 432, 107 S. E., 451; *Blanchard v. Peanut Co.,* 182 N. C., 20, 108 S. E., 332; *DeLoache v. DeLoache,* 189 N. C., 394, 127 S. E., 419; *Dredging Co. v. State,* 191 N. C., 243, 131 S. E., 665.

The principle announced in the later decisions is thus expressed in *Rosser v. Bynum, supra:* "It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full or when such check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for."

There is evidence in the record tending to show that a bona fide controversy had arisen between the parties prior to the letter of 14 August, 1926, in which the checks were enclosed. In view of this situation the element of dispute or controversy was a fact to be determined by the jury. Therefore it was error for the trial judge to withdraw the case from the jury. The parties are entitled to have the whole controversy tried upon its merits.

Reversed.

STATE v. L. C. DEADMON.

(Filed 6 June, 1928.)

Criminal Law—Evidence—Evidence of Other Crimes as Substantive Proof.

On trial under indictment for burning a barn to collect fire insurance thereon, C. S., 4242, evidence that the defendant at another place, at some indefinite time in the past, had another barn to burn, is incompetent and does not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, and not a part of the same transaction.

CRIMINAL ACTION before *McElroy, J.*, at August Term, 1927, of DAVIE.

The defendant was charged, in a bill of indictment containing five counts, with burning a barn and its contents in order to collect the insurance thereon. The court submitted to the jury the first and second counts only. The chief witness for the State testified that the defendant attempted to induce said witness to burn the barn and suggested to him that he could take a box of shavings or waste and saturate it with kerosene, set a candle in the box, light it, and when it burned down to the contents, the shed and barn would burn down. The witness further testified that on the night of 25 August, 1925, that he hid in a pile of lumber near the barn and saw the defendant Deadmon go in the barn, saturate shavings with kerosene, light a candle and set it in the shavings. The fire occurred next day about ten or eleven o'clock. The defendant had gone to the eastern part of the State in company with Rev. Dr. Bryon Clark on the morning the fire occurred, and therefore was not in the county at the time. Twenty-three witnesses, including three deputy sheriffs of Iredell County, testified that the character of the State's witness was bad. The State's witness also admitted that he had been indicted by the defendant and charged with stealing corn and farming tools, and that twenty-three days after a warrant had been issued against him by the defendant he went before the grand jury to give evidence in regard to the charge contained in the bill of indictment.

W. A. Scott, Deputy Insurance Commissioner, while testifying for the State, was asked on cross-examination the following question in regard to a conversation he had with the defendant after the fire: "Q. Did he tell you what the value of it was?" (referring to Ford truck in barn at the time of the fire). "A. No sir." Thereupon the witness voluntarily proceeded as follows: "The threshing (machine) he said he got from G. W. Worford, was to pay $50.00 for it; said he and his son moved it and put it in the shed. The sawmill he got from Tom Stone, traded a Ford sedan for it. Said he gave Mr. Turner a mortgage on the sawmill. Said he put one of the trucks in the shed about six or eight months before the fire. Said he moved the sawmill on 13 August, and put it in the barn. I asked him about another fire he had near Statesville."

The record shows the following: "Objection by defendant—objection overruled and defendant excepts to any statement made by witness relating to any fire near Statesville, or any conversation about it. I asked him about this fire near Statesville and he said his property did burn up there. I asked him about two automobiles that he moved out there the day before; he said he did; said he carried two old automobiles there that was out of commission and put them in the shed under the barn out there late in the afternoon and the fire occurred that night. One was a Buick and I won't be positive what the other was. To the above defendant objected—objection overruled, and defendant excepted."

There was a verdict of guilty and from the judgment of the court sentencing the defendant to the State's prison for not less than ten and not more than fifteen years at hard labor, the defendant appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

T. F. Hudson, A. T. Grant and Hayden Clement for defendant.

BROGDEN, J. The question is this: Upon indictment for burning a barn under C. S., 4242, is evidence that another barn had burned where the defendant was living sometime prior to the burning in controversy, competent and admissible?

The point is raised by the testimony of witness Scott. It did not appear from the testimony when the fire occurred at Statesville or whether or not the defendant had insurance upon the property or not; neither did it appear as to whether or not the fire was of incendiary origin. The defendant objected to the testimony before it was offered and excepted to any statement made by the witness relating to the fire at Statesville, notwithstanding the court permitted the testimony and after the testimony was in the case the defendant again objected and excepted.

The principle of law applicable to the facts disclosed is thus stated in *S. v. Beam,* 184 N. C., 730, 115 S. E., 176. "One who commits a crime may be more likely to commit another; yet, logically, one crime does not prove another, nor tend to prove another, unless there is such a relation between them that proof of one tends to prove the other. Unless such a relation exists, it is illegal and manifestly unfair to require a man who is charged with a specific crime in the indictment to prepare a defense against other crimes that the State may attempt to prove against him, but which are not charged in the bill. The general rule should, therefore be strictly enforced in all cases where applicable."

There are certain exceptions to this general rule, when it becomes necessary to show intent, design or guilty knowledge, to make out the *res gestæ,* to prove identity or to establish a chain of circumstantial evidence upon the offense charged. However, upon the element of intent the court held in *S. v. Jeffries,* 117 N. C., 727, 23 S. E., 163, "If such testimony be admissible to prove such intent, the 'collateral offense' sought to be proved must be confined to a time before, or just about the time, the offense charged against the defendant is alleged to have been committed." "There must be a causal relation or logical and natural connection between the two acts, or they must form parts of but one transaction. Where one offense constitutes a necessary element of another, proof may be made thereof." *S. v. Beam,* 184 N. C., 736, 115 S. E., 176.

To the same effect is the holding in *S. v. Graham,* 121 N. C., 623, 28 S. E., 409: "Evidence of a distinct, substantive offense cannot be admitted in support of another offense, as a general rule. . . . It is when the transactions are so connected or contemporaneous as to form a continuing action that evidence of the collateral offense will be heard to prove the intent of the offense charged."

Again in *S. v. Dail,* 191 N. C., 231, 131 S. E., 573, *Stacy, C. J.,* stated the rule thus: "It is undoubtedly the general rule of law that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other." *S. v. Thompson,* 97 N. C., 496, 1 S. E., 921; *S. v. Murphy,* 84 N. C., 742; *S. v. McCall,* 131 N. C., 798, 42 S. E., 894; *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Beam,* 179 N. C., 768, 103 S. E., 370.

The evidence in controversy does not fall within any of the exceptions to the general rule so firmly and thoroughly established in the law. The exception of defendant thereto is sustained and a new trial awarded.

New trial.

R. T. HEATON ET UX. v. J. M. KILPATRICK.

(Filed 6 June, 1928.)

1. **Railroad—Right of Way—Width of Right of Way.**

   Where in an action of trespass, involving the title to mineral interests in land, the question depends upon the location and width of a railroad's right of way, as to whether it extended beyond the present location of its roadbed under a grant or deed, the presumption is that the right of way extends to the width specified in the charter of the railroad, in the absence of any restrictions contained in the deed to the railroad company.

2. **Same.**

   The presumption that the right of way of a railroad company extends to that given in its charter is aided by the provisions in the grant allowing the owners to cultivate the lands, under certain conditions, to that not required for railroad purposes.

3. **Evidence—Parol or Extrinsic Evidence—Parol Evidence Not Admissible Where Deed is Not Ambiguous.**

   Where a deed is not ambiguous, extrinsic evidence is not admissible to contradict, modify, or confirm its terms.

4. **Trial—Nonsuit—Refusal of Motion of Nonsuit on Conflicting Evidence Not Error.**

   A judgment as of nonsuit will not be granted when there is evidence to support the contentions of the adversary party.

APPEAL by defendant from *Deal, J.*, at January Term, 1928, of CHEROKEE. No error.

Action for trespass, involving title to land. From judgment on an adverse verdict, defendant appealed to the Supreme Court.

D. Witherspoon and Dillard & Hill for plaintiffs.
M. W. Bell and J. N. Moody for defendant.

CONNOR, J. Plaintiffs are the owners of a tract of land, situate in Cherokee County, North Carolina. The right of way of the Southern Railway Company runs over and across said tract of land. Defendant is the owner of all the talc and other minerals on and under the surface of that part of the said tract of land which lies northwest of the right of way of the Southern Railway Company. He does not own the talc and other minerals on or under the surface of so much of said tract of land as is included within the said right of way. The southeast boundary of the land on and under which defendant owns the talc and other minerals is the northwest boundary of said right of way. The questions arising out of the controversy between plaintiffs and defendant involve the location of the northwest boundary of said right of way.

Plaintiffs allege that this boundary is located one hundred feet from the center of the track of the Southern Railway Company, as the same passes over and across its right of way located on the tract of land owned by the plaintiffs. This allegation is denied by defendant. He contends that the right of way of the said railway company includes only so much of said tract of land as is actually occupied and used by said railway company for its track, and for the ditches on each side of the track.

There was evidence tending to show that defendant had entered upon the tract of land owned by plaintiffs, on the northwest side of the railroad track, and within one hundred feet from the center of said track, and that he had removed therefrom talc and other minerals, claiming that he owned the same, for that said talc and other minerals were on and under the surface of that part of the tract of land owned by plaintiffs which lies northwest of the right of way of the Southern Railway Company.

The determinative question, therefore, is, what is the width of the right of way of the Southern Railway Company, as the same is located upon the tract of land owned by the plaintiffs?

Plaintiffs offered in evidence a deed executed in 1883 and recorded prior to the deeds under which plaintiffs and defendant, respectively, claim, by which the then owner of said tract of land conveyed to the Western North Carolina Railroad Company "the right of way" for said railroad company over said tract of land, excepting, however, "all the minerals and metals, and the right to cultivate up to the road bed, where the same is not used by the company, or needed for railroad purposes, and does not injure the interest of the company." No words appear in said deed, fixing definitely, and with certainty the width of the right of way thereby granted and conveyed. It is manifest, however, from the words used in the exception that the said right of way included more than the road bed, and extended some distance, at least, on either side of the same. Otherwise, the exception would be meaningless, at least for all practical purposes. If the deed is susceptible of construction, the courts will look to all of its provisions in order to determine its effect.

For the purpose of making certain that which under the deed is uncertain, plaintiffs offered in evidence certain provisions of the charter of the Western North Carolina Railroad Company, chapter 228, Laws 1854-55. These charter provisions are to the effect that in the absence of restrictions in a deed for a right of way over land conveyed to said company, the width of such right of way is two hundred feet, that is, one hundred feet on each side of the track.

Defendant's objection to the introduction of this evidence was properly overruled. Plaintiffs do not repudiate the deed by which the right of way over and across their land was conveyed, nor do they rely upon the statutory presumption as to the source of title to said right of way. *Hickory v. R. R.*, 137 N. C., 189, cited in defendant's brief, has no application. The principle upon which plaintiffs rely in support of the competency of this evidence is stated by *Brogden, J.*, in *Wearn v. R. R.*, 191 N. C., 575, as follows:

"The law of North Carolina as declared in many decisions is to the effect that if a railroad company enters upon land under a deed or grant from the owner which purports to convey an unrestricted right of way and no definite quantity or width of land is specified, and thereafter constructs its road thereon, then it is presumed that the owner has granted to the company the width designated in the charter or in the general statute. This statutory presumption, therefore, applies; (1) in the absence of a contract between the parties; (2) when the contract purports to convey an unrestricted right of way and no definite quantity or width is specified; (3) only against the owner across or over whose land the track is constructed," citing numerous cases.

Plaintiffs offered other evidence tending to show that the Southern Railway Company is now the owner of the right of way over and across the tract of land owned by them, originally conveyed to the Western North Carolina Railroad Company, and was such owner at the date of the execution of the deeds under which both plaintiffs and defendant claim, respectively.

Plaintiffs offered in evidence a deed dated 14 May, 1918, by which defendant conveyed to plaintiffs the tract of land now owned by plaintiffs, "excepting and reserving from the operation of this deed one-half of all mineral of whatever name, kind or description that may be in, under, upon or over that part of the above conveyed land that lays on the northwest side of the right of way of the Southern Railway Company, and the right of way of the Southern Railway Company and the Georgia and North Carolina Railroad Company are also excepted from the operation of this deed."

Subsequently, to wit, on 22 May, 1919, plaintiffs conveyed to defendant "one-half of all minerals of whatever name, kind or description that may be in, under, upon or over that part of tract No. 40, District No. 6, which lays or lies on the northwest side of the right of way of the Southern Railway Company, being the same one-half of said minerals conveyed to said Heaton and wife by said Kilpatrick by said deed of 14 May, 1918, reference to which is again made."

On the cross-examination of plaintiff, R. T. Heaton, who had testified as a witness in behalf of plaintiffs, he was asked the following question: "And under that arrangement, Mr. Kilpatrick retained title to a half interest in the talc and other minerals, and you had a half interest northwest of the railroad?"

Plaintiffs' objection to this question was sustained. Defendant excepted and assigns as error the ruling of the court, by which plaintiffs' objection to the question was sustained. The record shows that the witness would have answered, had he been permitted to do so, that Kilpatrick retained a half interest in said talc and other minerals, as set out in the deed. The principle stated in *Wearn v. R. R.,* 191 N. C., 575, at page 580, and cited by defendant, in his brief filed in this Court, to the effect that where, from the terms of the contract or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that particular construction, has no application to the facts presented by this assignment of error. There is no ambiguity in the language of the deed, describing the land on and under which the talc and other minerals were conveyed. The location of the northwest boundary of the right of way is the only matter in controversy between the parties.

At the close of the evidence offered by plaintiffs, defendant moved for judgment as of nonsuit, and excepted to the refusal of the court to allow his motion. No evidence was offered by defendant. The assignment of error based upon the refusal of the motion for judgment as of nonsuit is not sustained. All the evidence tended to show that the northwest boundary of the right of way of the Southern Railway Company as the same passes over and across plaintiff's tract of land is located at a distance of one hundred feet from the center of the track of the said railway company. There is, therefore, no error in the instruction of the court to the jury, with respect to the first issue. The assignment of error based upon defendant's exception to said instruction is not sustained. The judgment is affirmed.

No error.

FRANK A. BARBER AND WIFE, MARY P. BARBER, v. B. GEORGE BARBER AND WIFE, STELLA P. BARBER, WACHOVIA BANK & TRUST COMPANY, TRUSTEE, AND STELLA P. BARBER, GUARDIAN AD LITEM, ET AL.

(Filed 6 June, 1928.)

1. **Partition—Actions for Partition—Proceedings and Relief—Sale for Partition.**

In proceedings for partition of lands among tenants in common, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of fact to be determined by the trial judge, and not an issue of fact for the jury, and the trial judge has the power to order a sale for partition. C. S., 3215, 3233.

2. Partition—Actions for Partition—Right to Partition and Defenses Thereto.

The right of a tenant in common to have the lands sold for a division, C. S., 3215, cannot be defeated by a trust creating an interest in the lands by another of the tenants.

3. Same—Parties.

Under a trust created in the lands held in common by one of the tenants therein, the trustee and the beneficiaries are proper parties to the proceedings for a sale for division, so that they may preserve their rights in the proceeds of the sale to be apportioned to the tenant under whom they are thus acquired.

4. Same.

The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, with the right to be heard when the lands are sold for division in order to protect her contingent interests in the proceeds of the sale.

APPEAL by defendant, Stella P. Barber, individually, and as guardian *ad litem* from *Moore, J.,* at January Term, 1928, of BUNCOMBE. Affirmed.

Proceeding for partition of land between plaintiff, Frank A. Barber, and defendant, B. George Barber, as tenants in common.

From judgment ordering that the land be sold for partition, defendant, Stella P. Barber, wife of defendant, B. George Barber, and guardian *ad litem* of the infant defendants, appealed to the Supreme Court.

Campbell & Sample for plaintiffs.
J. M. Horner, Jr., for defendants.

CONNOR, J. Plaintiff, Frank A. Barber, and defendant, B. George Barber, are owners, as tenants in common of a lot of land situate in the city of Asheville, N. C., described in the petition filed in this proceeding. This lot of land has a frontage on a public street in said city of twenty-five feet; there is located on said lot a two-story brick building, constructed and used for business purposes. It is admitted in the pleadings, and was found as a fact upon the hearing, that said lot is not susceptible of actual partition. This is in effect a finding by the court that an actual partition of said lot of land cannot be made without injury to all of the parties interested therein.

A tenant in common is entitled as a matter of right to partition of the land held in common, to the end that he may have and enjoy his share therein in severalty. *Foster v. Williams,* 182 N. C., 632; *Haddock v. Stocks,* 167 N. C., 70; *Holmes v. Holmes,* 55 N. C., 334.

Whether or not, in a proceeding instituted under C. S., 3215, for partition of land, held by two or more persons as tenants in common, between or among such persons, there shall be an actual partition, or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. The statute provides that "if it shall appear by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof." C. S., 3233. When one tenant in common prays in his petition that the land be sold for partition, upon an allegation that an actual partition cannot be made without injury to some or all of the parties interested in the land, and the allegation is denied, no issue of fact is raised thereby, to be submitted to and passed upon by a jury. *Vanderbilt v. Roberts,* 162 N. C., 273; *Taylor v. Carrow,* 156 N. C., 8; *Ledbetter v. Pinner,* 120 N. C., 455.

In the instant case, upon the admissions in the pleadings, Frank A. Barber, the owner of an undivided one-half interest in the lot of land described in the petition, is entitled as a matter of right to partition of said lot of land, to the end that he may hold and enjoy his said interest in severalty, and the court was authorized and empowered, by statute, to order a sale of said lot of land, to the end that he may have such partition, without injury to himself and to the other parties to the proceeding, which would, upon the admission, result from an actual partition. He cannot be denied his rights because of interests which defendants, other than B. George Barber, claiming under him have acquired, in and to his undivided interest in said lot of land.

Prior to the date of the commencement of this proceeding, defendant, B. George Barber, had executed a deed of trust, by which he conveyed to the Wachovia Bank & Trust Company, trustee, all of the income which he, the said B. George Barber might thereafter derive from the building located on the lot of land described in the petition in this proceeding. This income, together with other property, real and personal, was conveyed to the said trustee to hold, control and manage for the use and benefit of Stella P. Barber, wife of B. George Barber, and their children, viz.: Frances L. Barber, Geo. F. Barber and Charlotte E. Barber. The said children are infants and are represented in this proceeding by Stella P. Barber, their duly appointed guardian *ad litem.* The Wachovia Bank & Trust Company, trustee, Stella P. Barber, wife of B. George Barber, and the said children, represented by their guardian *ad litem* are proper parties to this proceeding, for they have an interest in the land described in the petition, which will be affected by the sale for partition. Their interest in said land, however, derived from the deed of trust executed by the defendant, B. George Barber, to Wachovia

Bank & Trust Company, is confined and limited to the one-half undivided interest of B. George Barber, and does not extend to the interest of the plaintiffs in said land. Such interest as they have in the land will, upon its sale, attach to the proceeds, and will be fully protected in the final judgment or order in this proceeding.

Defendant, Stella P. Barber, as wife of defendant, B. George Barber, is also a proper party to this proceeding. She has an inchoate right to dower in the undivided one-half interest of her husband in said land. She has a right to be heard upon the confirmation of the sale and upon the order for the distribution of the proceeds. *Valentine v. Granite Corporation,* 193 N. C., 578. She cannot, however, upon the facts alleged in her answer, resist plaintiffs' right to partition, nor challenge the power of the court to order a sale for partition. As the wife of a tenant in common, she has no present right to or estate in the land; she has no dominion over it. She has only a right therein, contingent upon her surviving her husband, and thus becoming his widow—that is, the right to dower. *Rodman v. Robinson,* 134 N. C., 503; *Gatewood v. Tomlinson,* 113 N. C., 312.

Defendants' assignments of error based upon exceptions appearing in the case on appeal cannot be sustained. The judgment is

Affirmed.

J. P. CLARK ET AL. v. JOHN R. MCQUEEN ET AL.

(Filed 6 June, 1928.)

1. **Schools and School Districts—Discontinuance, Changing, or Consolidating Schools—Powers of Board of Education—Statutes.**

   Our statutes, 3 C. S., 5428, 5437, vests in the sound discretion of the board of education of a county the right to transfer an existing school in one district to an adjoining district for the advantage of the residents of the county, and with the fair exercise of this discretion, or in the absence of manifest abuse, the courts will not interfere, or give injunctive relief.

2. **Same—Supplementary Order for Pay of Teachers Within Discretion of Trial Court.**

   Where an appeal has been taken from a judgment of the Superior Court judge, vacating a restraining order upon the county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal is within the sound discretion of the trial judge, and not reviewable. 3 C. S., 858(a).

APPEAL from order of *Oglesby, J.*, dated 14 October, 1927. Affirmed.

Action for judgment perpetually enjoining and restraining defendants, board of education, and superintendent of public schools of Moore County, from discontinuing a high school in Jackson Springs School District, and transferring same to West End School District, in said county, and for other relief, heard upon an order to show cause why plaintiffs are not entitled to the relief demanded.

From judgment vacating and dissolving a temporary restraining order, plaintiffs appealed to the Supreme Court.

Varser, Lawrence, Proctor & McIntyre for plaintiffs.
U. L. Spence and Hoyle & Hoyle for defendants.

CONNOR, J. Prior to 25 February, 1927, a school, in which both elementary and high school instruction was available for all the children residing therein, was maintained by defendant, the board of education of Moore County, in Jackson Springs School District of said county. 3 C. S., 5428 and 3 C. S., 5437. The said school was maintained by funds allotted and appropriated to said district, out of the school fund of said county, by said defendant, and also, in part, by special taxes levied and collected in said district, as authorized by special elections duly held therein, in order to supplement the school fund of said district.

On 25 February, 1927, the defendant, the board of education of Moore County, after a hearing pursuant to notice to the school committee of said district, ordered that said high school be transferred from said district to the West End School District, in said county. Subsequently, other orders were made by said defendant for the purpose of discontinuing said high school in said district, of effecting said transfer, and of establishing and maintaining a high school in West End School District, which adjoins the Jackson Springs School District.

Plaintiffs, the school committee of Jackson Springs School District, and certain taxpayers residing therein, have brought this action to recover judgment that defendants, the board of education and the superintendent of the public schools of Moore County, be enjoined and restrained perpetually from discontinuing said high school in said district, and from transferring same to West End School District, in accordance with the orders made by defendant, the board of education of Moore County. They have appealed to this Court from an order vacating and dissolving a temporary restraining order entered herein, in which defendants were ordered to show cause why plaintiffs are not entitled to the relief demanded.

Upon the hearing, the court was of opinion, and so adjudged, that "The board of education of Moore County has the legal discretion and power to fix the location of all high schools in said county, and that the action of said board in fixing the teaching of a high school at West End, in West End School District, said county, for the year 1927-28, and in discontinuing the high school at Jackson Springs, in Jackson Springs School District, for said year, is in all respects legal and binding upon the parties to this action." It was thereupon ordered, considered and adjudged "that the restraining order and injunction heretofore granted in this cause be and the same is in all respects vacated and dissolved." Plaintiffs excepted to this order, and upon their appeal to this Court assign same as error.

The only question presented by this appeal is whether the board of education of a county, in this State, has the power, in the exercise of its discretion, to discontinue a high school, theretofore established by said board, in a school district of its county, and to transfer said high school to an adjoining district in said county.

A county board of education is required by statute to divide the county into districts, and to so locate schools therein that both elementary and high school instruction may be available for all the children of the county. 3 C. S., 5428. It is the duty of the county board of education, on recommendation of the county superintendent, to locate high schools in the county or to arrange for high school instruction in special charter districts so as to provide good high school instruction for all the children. 3 C. S., 5436 and 3 C. S., 5437. In the absence of statutory limitations upon the power to perform this duty, discretion is vested in said boards to locate, discontinue, transfer and establish high schools in the districts of their several counties. In the absence of abuse, this discretion cannot be set aside or controlled by the courts. The principle stated and applied in deciding the question presented by the appeal in *Newton v. School Committee,* 158 N. C., 187 is well settled. In the opinion by *Hoke, J.,* in that case, it is said: "In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with discretionary powers conferred on local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion," citing many cases. This principle has been frequently approved in decisions by this Court. It is applicable to the question here presented. Plaintiffs' assignments of error cannot be sustained.

After the order vacating and dissolving the temporary restraining order was signed, and plaintiffs had excepted and given notice of appeal, the court, upon motion of plaintiffs, made a supplementary order, by which the superintendent of public schools of Moore County was ordered to approve vouchers for payment of teachers in the Jackson Springs high school, as a charge against the special tax school fund of said district, until the final disposition of plaintiffs' appeal in this Court. Defendants excepted to this order and appealed therefrom to this Court. Under the statute, the signing of this order was within the discretion of the court. 3 C. S., 858(a). We find no error on defendants' appeal.

On plaintiffs' appeal, the judgment is

Affirmed.

BRANCH BANKING & TRUST COMPANY, RECEIVER OF BANK OF WARSAW, v. H. F. PEIRCE ET AL.

(Filed 6 June, 1928.)

1. **Pleadings—Demurrer—Misjoinder of Parties and Causes of Action.**

   An action by the receiver of an insolvent bank against its directors and officers, to recover for depositors and creditors moneys fraudulently diverted to their own use by the defendants in various amounts, is not demurrable for misjoinder of parties and causes of action, when, in effect, the allegations are of a conspiracy, participated in by all to accomplish the particular result complained of as the bases of the action, narrating one general scheme tending to a single end. *Young v. Young*, 81 N. C., 92, cited and applied.

2. **Banks and Banking—Officers and Directors—Only Depositors Can Sue Officers and Directors for Wrongfully Receiving Deposits.**

   While a demurrer to the complaint of a receiver of a defunct bank is bad in this case: *Held*, the depositors alone may sue to recover upon allegations of the wrongful receipt of their deposits, and such allegations on proper motion will be stricken from the complaint in the receiver's action.

APPEAL by defendants from *Lyon, Emergency Judge,* at December Term, 1927, of DUPLIN.

Civil action instituted by plaintiff, receiver, under order of court, against the defendants, living directors, executors and administrators of directors since deceased, and the general officers of the Bank of Warsaw, to recover, for the benefit of depositors and creditors, moneys and assets, some alleged to have been wrongfully received, others negligently diverted, and still others recklessly squandered by said officers and directors, during their respective administrations, and in which they all participated to the extent alleged against each, under a general course of dealing or systematic policy of mismanagement, "wrongdoing, concealment and fraud," commencing in the year 1919 and ending on 22 April, 1926, when the said bank was closed because of its insolvency.

Demurrers were interposed by all the defendants principally upon two grounds:

First, because of a misjoinder of parties and a misjoinder of causes of action.

Second, for that no cause of action is stated in favor of the plaintiff on account of deposits alleged to have been wrongfully received.

From a judgment overruling the several demurrers, the defendants appeal, assigning errors.

W. A. Finch, M. C. Glover, Pou & Pou and J. L. Emanuel for plaintiff.

Dickinson & Freeman for defendant, John W. Quinn.

Joseph E. Johnson, Kenneth C. Royall and R. D. Johnson for defendants, R. H. Best and Huldah W. Best, administratrix of L. P. Best.

N. W. Outlaw and L. I. Moore for defendant, G. G. Best.

D. L. Carlton for Bevie K. Middleton, administratrix of L. Middleton.

Joseph E. Johnson and Rivers D. Johnson for defendants, H. F. Peirce and E. W. Jordan.

Gavin & Boney and Cowper, Whitaker & Allen for defendants, J. J. Bowden and H. H. Carlton.

STACY, C. J. Without undertaking to state the substance of the complaint, which covers 95 pages of the record and contains more than 290 paragraphs or separate allegations, suffice it to say a careful perusal of the record leaves us with the impression that the demurrers were properly overruled on the alleged ground of multifariousness or misjoinder of parties and causes of action. *Furniture Co. v. R. R., ante,* 636.

The one circumstance which differentiates this case from those cited by the defendants, especially *Emerson v. Gaither,* 103 Md., 564, 7 Ann. Cas., 1114, most nearly in point and upon which great reliance is put, is the allegation of a general course of dealing and systematic policy of wrongdoing, concealment and mismanagement, virtually amounting to a conspiracy, in which the defendants are all charged with having participated at different times and in varying degrees. *Cotten v. Laurel Park Estates, post,* 848, 141 S. E., 339. A connected story is told and a complete picture is painted of a series of transactions, forming one general scheme, and tending to a single end. This saves the pleading from the challenge of the demurrers. *Cotton Mills v. Maslin, ante,* 12; *Bedsole v. Monroe,* 40 N. C., 313; *Fisher v. Trust Co.,* 138 N. C., 224, 50 S. E., 659; *Oyster v. Mining Co.,* 140 N. C., 135, 52 S. E., 198; *Hawk v. Lumber Co.,* 145 N. C., 47, 58 S. E., 603; *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465.

In *Young v. Young,* 81 N. C., 92, it was held (as stated in the first headnote): "Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit." And it has been held that in such case the share of each, in causing the total loss, may be separately measured and assessed in one action. *Long v. Swindell,* 77 N. C., 176.

But under *Wall v. Howard,* 194 N. C., 310, 139 S. E., 449, and *Bane v. Powell,* 192 N. C., 387, 135 S. E., 118, the allegations with respect to the wrongful receipt of deposits would seem to be without avail and superfluous in an action by the receiver. On motion, they should be stricken from the complaint. The injured depositors alone may sue for such alleged wrongs. To this extent, the demurrers are valid upon the second ground stated above.

Modified and Affirmed.

BOARD OF COMMISSIONERS FOR THE COUNTY OF McDOWELL, STATE OF NORTH CAROLINA, v. ASSELL, GOETZ & MOERLIN, INC.

(Filed 6 June, 1928.)

Appeal and Error—Record—Questions Not Presented on Record—Review—Rehearing.

A question not presented on record of a former decision will not be considered in the Supreme Court on a motion to rehear the case.

PETITION to rehear.

Winbourne & Proctor, Pless & Pless, Wm. Henry Hoyt and Chester B. Masslich for petitioner, appellee.

Morgan & Ragland for appellants.

Bruce Craven amicus curiæ.

CLARKSON, J. This is a petition by appellee to rehear the above action. The Court's decision is set forth in *Comrs. v. Assell,* 194 N. C., p. 412.

The Court said, in that opinion, at p. 418: "The record does show that the proposed bond issue was for necessary expenses of the county and a valid and legal obligation of the county. The subject or subjects of the necessary expense or expenses for special county purposes are not set forth, and nothing else appearing, it is taken for granted that they were for one or more special necessary purposes and funding permissible under Constitution, Art. V, sec. 6, and the County Finance Act. The special approval has been given by the general act." This was the sole question before the Court presented by the appeal.

Appellees on their petition to rehear seek to present the following question: "Is the county tax to be deemed 'levied for a special purpose and with the approval of the General Assembly, which may be done by special or general act,' within the meaning of Const. of N. C., Art. V, sec. 6, and therefore exempt from the 15-cents tax limit prescribed by that section, where the tax is levied pursuant to express authority conferred by the county finance act for the purpose of paying certain funding bonds authorized by the act, and where the debt to be funded by the bond issue may have been incurred for ordinary current expenses, the debt being one which was outstanding at the time of ratification of the County Finance Act and validated by the act?" This question was not and is not presented by the record.

Petition dismissed.

TRI-STATE TRANSPORTATION COMPANY v. STEARNS BROS., INC., GLOBE INDEMNITY CO., AND IREDELL COUNTY.

(Filed 6 June, 1928.)

Arbitration and Award—Award, After Agreement of Submission, Final as to Costs and Expenses.

Where an action upon a money demand has been referred to arbitrators under agreement that their report be final and binding, and the final judgment of court, the award to the plaintiff of a certain amount and interest, together with the costs of the action, excludes any discretion of the trial judge in taxing the plaintiff with fees for the services of the arbitrators and stenographer.

APPEAL by plaintiff from *Finley, J.*, at November Term, 1927, of IREDELL.

Civil action to recover balance alleged to be due for labor performed in and about the construction of a hard-surfaced highway in Iredell County, known as project No. 641.

By agreement of the parties, duly entered of record with the court's approval at the November Term, 1926, "all the matters involved" were referred to a board of arbitration, consisting of three members, of which Hon. Stahle Linn, of Salisbury, N. C., was designated as chairman. This agreement contains the following stipulation:

"It is agreed that the report of this board of arbitrators so selected as above provided shall be final and become a rule of court without exception from either side, the award to be final and binding on all the parties to this litigation, and be the final judgment of the court."

In October, 1927, the arbitrators filed their report and awarded the plaintiff, Tri-State Transportation Company, "the sum of $3,338.17, which sum, together with the interest thereon from 24 November, 1924, the plaintiff is entitled to recover from the defendants, Stearns Brothers, Inc., and Globe Indemnity Company, together with the costs of this action."

From a judgment upon the award, taxing the defendants with the "usual and ordinary costs of the action," but adjudging that the compensation fixed for the arbitrators and the stenographer's fees, "be paid one-half by the plaintiff, and one-half by the defendants," the plaintiff appeals, assigning errors, in that, the court refused to include allowances to the arbitrators and fees of the stenographer (amounts not in dispute) as parts of the costs to be taxed against the defendants, and divided the compensation made to the arbitrators and the fees allowed to the stenographer, adjudging that the plaintiff pay one-half of said sums.

Self & Bagby for plaintiff.
H. P. Grier for defendants.

STACY, C. J. It was agreed that the report of the arbitrators should be the final judgment of the court and binding on all parties to the litigation. The arbitrators awarded the plaintiff a given sum with interest "together with the costs of this action." That they thereby intended to include in their award as a part of the costs of the action, whatever allowances should be made to the arbitrators and the fees of the stenographer, is a fairly permissible deduction from the language used. Undoubtedly, the agreement to arbitrate is broad enough to cover such allowances and fees, and it was the intention of the parties that the award of the arbitrators should settle all matters involved. This, we think, the award does.

The case of *Griffin v. Hadley,* 53 N. C., 82, strongly relied upon by the defendants, is distinguishable in that there the agreement to arbitrate was more restricted than here. Indeed, in the instant case, the award is to be "the final judgment of the court." This, it cannot be unless it fully determines the controversy. The parties, as well as the arbitrators, intended that it should operate as a complete settlement of "all the matters involved."

Let the cause be remanded, to the end that judgment may be entered to this effect.

Error.

ALEX B. DRYSDALE, J. D. DUFF AND YATES W. LITTLE, AS THE BOARD OF DRUID HILLS SANITARY DISTRICT, v. PAUL P. PRUDDEN, HARRY L. HUTCHISON, ALBERT C. MITTENDORF, HOWARD A. EMIG, EDWARD A. DAHLY, RALPH M. WINTERS AND PARKER CAMPBELL, COPARTNERS, DOING BUSINESS UNDER FIRM NAME AND STYLE OF PRUDDEN AND COMPANY.

(Filed 6 June, 1928.)

1. **Sanitary Districts—Creation—Special Act Creating Sanitary District Unconstitutional—Health.**

An act of the Legislature attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assessments or taxing powers for the purpose is void, being in violation of the provisions of Article II, sec. 29 of the Constitution of North Carolina, prohibiting the enactment of local, private, or special acts relating to "health, sanitation," etc.

2. **Same—General Act Creating Sanitary Districts Constitutional.**

Chapter 100, Public Laws 1927, under which sanitary districts may be created upon petition and approving vote of the residents therein, with further approval of the State Board of Health after a hearing both by the local authorities and by the State Board of Health, with power to issue bonds, *Held:* a general law of Statewide application relating to health, and valid.

3. **Same—Provision in General Act for Optional Exclusion of Industrial Village Does Not Affect Constitutionality.**

The validity of chapter 100, Public Laws 1927, relating to the formation of sanitary districts is not affected by the provisions that certain industrial enterprises and villages situate therein may be excluded upon application of the owners.

4. **Sanitary Districts—Bonds—Taxation.**

Bonds issued by a sanitary district formed in accordance with chapter 100, Public Laws 1927, are a valid obligation, and binding upon the property within the district as a general tax and not an assessment of property according to benefits received.

5. **Same—Property Benefited.**

Bonds issued by a sanitary district for sewerage and a water supply under the provision of chapter 100, Public Laws 1927, will not be declared invalid because not differentiating between property benefited and not benefited when the voters within the territory unanimously voted for their issuance, and having full notice and opportunity to do so, no one appeared to make objection on that ground.

6. **Constitutional Law—Police Power—Health.**

Statutes of general application relating to health, sanitation, etc., fall within the police powers of the State.

7. **Sanitary Districts—Bonds—Taxation—Public Necessity.**

Sewerage and water bonds issued by a sanitary district under chapter 100, Public Laws 1927, are for a public necessity, and valid.

8. Statutes—Construction—Presumption of Constitutionality.

The courts will not declare a statute void as unconstitutional unless the violation of the Constitution is so manifest as to leave no room for a reasonable doubt.

APPEAL by defendants from *Schenck, J.,* at March Term, 1928, of HENDERSON. Affirmed.

This is a controversy without action. C. S., 626.

The following is the agreed statement of facts:

"1. The above named Alex B. Drysdale, J. D. Duff and Yates W. Little, hereinafter called the plaintiffs, are the members and constitute the board of Druid Hills Sanitary District, elected and qualified in accordance with the provisions of chapter 100, Public Laws 1927.

"2. The above named Paul P. Prudden, Harry L. Hutchison, Albert C. Mittendorf, Howard A. Emig, Edward A. Dahly, Ralph M. Winters, and Parker Campbell, hereinafter called the defendants, are copartners, engaged in the business of investment banking under the firm name of Prudden and Company.

"3. The Druid Hills Sanitary District was created pursuant to the provisions of a general act entitled, 'An act to enable the creation, government, maintenance and operation of sanitary districts and prescribing the powers of such districts,' ratified 4 March, 1927, constituting chapter 100, Public Laws 1927; and every requirement of the said general act for the creation of the said district and the issuance of the bonds hereinafter mentioned has been complied with, the said district having been created by a resolution of the Board of Health of the State of North Carolina, passed 23 August, 1927, which resolution contained a description by metes and bounds, of the territory comprising the district and an election upon the question of the issuance of the hereinafter described bonds having been duly held, all according to the requirements of the said general act, and in the election the vote was unanimous for the issuance of the hereinafter described bonds.

"That after the word 'included' in the second line of the proviso of section 5, chapter 100, Public Laws 1927, there are the words 'within or excluded' in the act as passed by the Legislature, but that these words 'within or excluded,' were omitted in the publication of the printed act, in the bound volume of the Public Laws 1927.

"4. The identical territory comprising the said Druid Hills Sanitary District was created or attempted to be created into a district called Druid Hills Sanitary and Maintenance District by a special act, ratified 7 March, 1927, entitled, 'An act to create in Henderson County a special sanitary and maintenance district to be known as the Druid Hills Sanitary and Maintenance District,' constituting chapter 229, Private Laws

1927. The governing board of the district appointed by the herein cited special act unanimously requested that the territory described in the special act be included in the territory comprising the district as created by resolution of the Board of Health of the State of North Carolina, passed 23 August, 1927.

"5. Acting pursuant to said general act, and disregarding said special act, the plaintiffs have taken proceedings for the issuance of bonds of Druid Hills Sanitary District in the aggregate principal amount of $75,000 for the purpose of acquiring, constructing, maintaining and operating a sewerage system and water supply system in and for said district, and have entered into a contract with the defendants, whereby the defendants have agreed to purchase said bonds at par and accrued interest, it being stipulated in said contract, however, that the defendants shall not be obligated to take up and pay for said bonds unless said bonds constitute the full and valid obligation of Druid Hills Sanitary District, and be payable from an unlimited *ad valorem* tax upon all taxable property of said district and not from special assessments.

"6. The plaintiffs contend that said bonds have been lawfully authorized and when issued will be the full and valid obligations of Druid Hills Sanitary District, payable from an unlimited *ad valorem* tax upon all taxable property of the said district and not from special assessments, and that the tax limit prescribed by chapter 229, Private Laws 1927, the special act, is not applicable to said bonds, for the following reasons:

"(a) Chapter 229, Private Laws 1927, is a local and private act relating to sanitation and health in violation of section 29, Article II, Constitution of North Carolina.

"(b) The tax authorized by section 10, chapter 229, Private Laws 1927, is in violation of section 3, Article V, and section 9, Article VII, Constitution of North Carolina, in that said tax is not to be levied uniformly upon all taxable property within the district.

"(c) Even if chapter 229, Private Laws 1927, is constitutional, it is inapplicable to Druid Hills Sanitary District, created under chapter 100, Public Laws 1927. The special act should not be construed to be inconsistent with or as repealing the said general act but should be held and construed to be cumulative thereto.

"(d) Chapter 100, Public Laws 1927, is in all respects constitutional and valid and authorized for the payment of bonds issued thereunder not special assessments, but an unlimited *ad valorem* tax upon all taxable property within the district created thereunder.

"7. The defendants contend that said bonds have not been lawfully authorized and that when issued will not be the full and valid obligations of Druid Hills Sanitary District payable from an unlimited *ad valorem* tax upon all taxable property of the said district and not from special assessments, and that the tax limit prescribed by chapter 229, Private Laws 1927, the special act, is applicable to said bonds, for the following reasons:

"(a) Chapter 229, Private Laws 1927, is not a local and private law relating to sanitation and health in violation of section 29, Article II, Constitution of North Carolina.

"(b) The tax authorized by section 10, chapter 229, Private Laws 1927, is not in violation of section 3, Article V, and section 9, Article VII, Constitution of North Carolina. Said section 3 and section 9 apply only to an *ad valorem* tax levied by a district such as the Druid Hills Sanitary and Maintenance District.

"(c) Even if the tax authorized by section 10, chapter 229, Private Laws 1927, is not valid and constitutional as an *ad valorem* tax it may and should be upheld and given effect as a special assessment against real property benefited.

"(d) The enactment of chapter 229, Private Laws 1927, terminated the applicability of chapter 100, Public Laws 1927, to the territory created by chapter 229 into Druid Hills Sanitary and Maintenance District.

"(e) Even if Druid Hills Sanitary District is not a complete nullity, chapter 229, Private Laws 1927, is applicable to it and (1) the district has no power to issue bonds. (2) The district has no power to *construct* a sewer or water system. (3) The district has no power to levy an unlimited *ad valorem* tax.

"(f) Even if chapter 229, Private Laws 1927, is unconstitutional or inapplicable to Druid Hills Sanitary District, chapter 100, Public Laws 1927, is in conflict with section 17, Article I, Constitution of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States and therefore void because:

"(1) It affords to the property owners within the proposed district no hearing upon the question of benefits to their property before an agency having power to exclude from the district property which will not be benefited by the improvements to be constructed or acquired. (2) It authorizes the exclusion from the district of any industrial plant and its contiguous village upon application of the person or corporation owning or controlling the same without any hearing and determination that such industrial and contiguous village will not be benefited by the improvements to be acquired or constructed in the district.

"(g) Even if chapter 229, Private Laws 1927, is unconstitutional or inapplicable to Druid Hills Sanitary District, the tax authorized by section 17, chapter 100, Public Laws 1927, is invalid and unconstitutional. The General Assembly cannot delegate to a sanitary district, created for the limited purpose of making sanitary improvements within the district, the unrestricted power to levy an unlimited *ad valorem* tax upon all taxable property within the district.

"8. The defendants have refused to accept delivery of said bonds, but if the plaintiffs are authorized to issue them, and they will constitute the full and valid obligations of Druid Hills Sanitary District, payable from an unlimited *ad valorem* tax upon all taxable property of said district and not from special assessments, then the defendants stand ready, willing and able to take up and pay for the same in accordance with their contract."

The judgment of the court below is as follows:

"It is considered, ordered and decreed by the court that the $75,000 of bonds of Druid Hills Sanitary District, mentioned in the agreed case, and issued for the purpose of acquiring, constructing, and maintaining and operating a sewerage system and water supply system in and for said district, and issued pursuant to the provisions of chapter 100, Public Laws of North Carolina, 1927, are the valid, legal and binding obligations of the said Druid Hills Sanitary District, and that the said bonds when issued and delivered are payable from an unlimited *ad valorem* tax upon all taxable property in said district, as provided for by section 17, chapter 100, Public Laws 1927. It is further ordered, adjudged and decreed, that the defendants be and they are hereby required to pay for the said bonds in accordance with the terms of sale and award, when delivered by the plaintiffs. It is further ordered, adjudged and decreed that the defendants shall pay the costs in this action to be taxed by the clerk of Superior Court of Henderson County."

W. C. Meekins for plaintiffs.
C. N. Malone for defendants.

CLARKSON, J. Although the agreed statement of facts is rather prolix, an analysis presents practically only two material questions:

The first material question: Is chapter 229, Private Laws 1927, a local, private or special act in violation of section 29, Article II, Constitution North Carolina, and therefore void? We think so.

Private Laws 1927, chap. 29, the caption is: "An act to create in Henderson County a *special sanitary* and maintenance district to be known as the Druid Hills Sanitary and Maintenance District."

Section 1 designates the particular locality or territory, by metes and bounds. Section 5, is as follows: "To negotiate and enter into agreement with the owners of existing water supplies, sewerage system, electric light and power service, street equipment, or other such utilities as may be necessary to carry into effect the intent of this act."

Section 6: "To repair and generally to maintain in good and satisfactory working condition a sewer system, to repair and maintain the system of electric lighting installed for the lighting of said streets; to improve and maintain and beautify the parks and spaces of ground within said district dedicated to public use; to make contracts for the proper execution of the powers herein conferred, and to do everything necessary and incident to the execution of the powers herein conferred and authorized, and to pay for the same out of the district funds."

Const. of N. C., Art. II, sec. 29, is as follows: "The General Assembly shall not pass any local, private, or special act or resolution, relating to the establishment of courts inferior to the Superior Court, relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys; relating to ferries or bridges; relating to nonnavigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private or special laws enacted by it. Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

We think *Day v. Comrs.,* 191 N. C., 780 decisive of the first proposition. At pp. 783-4, it is said: "The first section of the act before us commands the commissioners of Surry and Yadkin counties to construct one bridge across the Yadkin River at a place which is pointed out and particularly defined; it is direct legislation addressed to the accomplishment of a single designated purpose at a 'specific spot'; it is therefore a local and special act, and as such is expressly prohibited by Art. II, sec. 29, of the Constitution. In further elucidation of this provision the following additional cases may be consulted: *Trustees v. Trust Co.,* 181 N. C., 306; *Sechrist v. Comrs., ibid.,* 511; *Robinson v. Comrs.,* 182 N. C., 590; *Galloway v. Board of Education,* 184 N. C., 245."

Reed v. Engineering Co., 188 N. C., p. 39, is distinguishable from the *Day case, supra.* In the *Reed case,* this Court sustained chapter 341, Public-Local Laws 1923, entitled "An act to create sanitary districts in Buncombe County, and describing their purposes and powers," against the objection that it violated section 29, Art. II. In that case the *act applied generally to the entire county of Buncombe.* It was there said (at p. 44): "Nor do we think the law is subject to the objection that it is local or special. A law which applies generally to a particular class of cases is not a local or special law. *Hymes v. Aydolott,* 26 Ind., 431; *Palmer v. Stumph,* 29 Ind., 329; 15 L. R. A., 508." *Davis v. Lenoir,* 178 N. C., 668.

It will be noted that the powers conferred by this local, private or special act in controversy, which we think void, are far more extensive than in the *Reed case, supra.*

The second material question: "Druid Hills Sanitary District was created pursuant to the provisions of a general act entitled 'An act to enable the creation, government, maintenance and operation of sanitary districts and prescribing the powers of such districts,' ratified 4 March, 1927, constituting chapter 100, Public Laws 1927; *and every requirement of the said general act for the creation of the said district and the issuance of the bonds hereinafter mentioned has been complied with,"* etc. Is this act constitutional and the bonds valid? We think so.

The act seems to be carefully drawn. Section 1, is as follows: "For the purpose of preserving and promoting the public health and welfare the State Board of Health may, as hereinafter provided, create sanitary districts without regard for county, township or municipal lines: *Provided, however,* that no municipal corporation or any part of the territory in a municipal corporation shall be included in a sanitary district except at the request of the governing body of such municipal corporation."

Fifty-one per cent or more of the resident freeholders within the proposed sanitary district may petition the board or boards of county commissioners, in which the land is situate, setting forth the boundaries of the proposed district. Public hearing is had after notice. If approved by the board or boards of county commissioners, petition transmitted to State Board of Health, to hold public hearing after notice. If State Board of Health shall deem it advisable to comply with the request, district shall be created and established, declaring the territory within such boundaries to be a sanitary district.

Section 5. "If, after hearing, the State Board of Health shall deem it advisable to comply with the request of said petition and that a district for the purpose or purposes therein stated should be created and established, the State Board of Health shall adopt a resolution to that effect, *defining the boundaries of such district and declaring the territory within such boundaries to be a sanitary district:* (Italics ours) *Pro-*

vided, however, that any industrial plant and its contiguous village shall be (ex) included from the area embraced within such sanitary district as expressed in the application of the person, persons or corporation owning or controlling such industrial plant and its contiguous village, said application to be filed with the State Board of Health on or before the date of the public hearing as hereinbefore provided. Each district when created shall be identified by a name or number assigned by the State Board of Health."

Section 6. "The State Board of Health shall cause copies of the resolution adopted creating the sanitary district to be sent to the board or boards of county commissioners of the county or counties in which all or parts of the territory within the district is located," etc. Meeting several or joint of county commissioners for electing sanitary district board. Board composed of three members, to be governing body of district. Method of selection of members. Term of office. Election of future boards. Members to be residents of district. Date for qualification. Term of office. Vacancies.

Section 7. "When a sanitary district is organized as herein provided the sanitary district board selected under the provisions of this act shall be a body politic and corporate and as such may sue and be sued in matters relating to such sanitary district. In addition, such board shall have the following powers: (1) Under the supervision of the State Board of Health, to acquire, construct, maintain and operate a sewerage system, sewer disposal or treatment plant, water supply system, water purification or treatment plant or such other utilities as may be necessary for the preservation and promotion of the public health and sanitary welfare within the district. (2) To issue certificates of indebtedness against the district in the manner hereinafter provided. (3) To issue bonds of the district in the manner hereinafter provided. (4) *To cause taxes to be levied and collected upon all the taxable property within the district sufficient to meet the obligations evidenced by bonds and certificates of indebtedness issued against the district."* (Italics ours.)

Finally, the machinery for an election on the proposition of issuing bonds to provide funds for doing the work as set forth in the resolution adopted by sanitary board.

In the present case it is stated that every requirement of the act was complied with and in the election the vote was unanimous for the issuance of the bonds. The responsibility was a dual one.

It is contended by appellants: (a) "That the so-called tax authorized by chapter 100, Public Laws 1927, is a special assessment and limited to an amount not in substantial excess of the benefits accruing to the property taxed." (b) "Because it does not authorize the State Board of Health to exclude from a sanitary district property which will not be benefited by the proposed improvements," therefore unconstitutional. Appellants cite *Browning v. Hooper,* 269 U. S., 369. The principle in that case is set forth as follows: Where a local improvement territory is selected and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of the property in the district have no constitutional right to be heard on the question of benefits. Where a road improvement district is created by mere petition of taxpayers, and there was no legislative determination that any included property would be benefited by the improvement, notice to property owners and an opportunity to be heard are essential to the due process of law in the taxing of the assessment. We think the *Browning case* distinguishable from the present one.

In the *Browning case,* the Court said, at p. 402-3: "The evidence persuasively supports appellants' contention that the improvements of the roads designated will not benefit their property. Moreover, the inclusion of their land in the road district makes it impossible until the last bonds mature thirty years hence, to create another road district to raise money for the improvement of roads needed to serve the territory in which their lands are situated." The *Browning case* involves roads—the present act, as it says, is *"for the purpose of preserving and promoting the public health and welfare,"* and the State Board of Health, as provided in the chapter, may create sanitary districts. Then again, taking a reasonable construction of section 5, *supra,* upon the hearing before the State Board of Health, any landowner if not benefited could be heard, before the State Board of Health defined the boundaries and created the sanitary district. It is well settled that "no land can be taken without being benefited." See *Drainage District v. Cahoon,* 193 N. C., p. 326.

It has long been decided that water and sewer are "necessary expenses," within the meaning of section 7, Article VII, Constitution of North Carolina, and "a vote of the majority of the qualified voters" is not necessary. *Storm v. Wrightsville Beach,* 189 N. C., p. 679. So, also, are roads. See *Davis v. Lenoir, supra.* This question does not arise as, in the present case, there was a vote.

In re Big Cold Water Drainage District, 162 N. C., at p. 129, it was held: "The objectors filed two assignments of error to the charge. The first of these is abandoned here. The other, that the court instructed the jury to take into consideration the health of the community instead of confining them to the question of health in so far as it affected the lands within the drainage district, cannot be sustained, for the court charged that the jury should consider 'not only the increased facilities of the land for producing crops, but the benefit to the health of the people who live in the district.' "

The benefit to the health of the people who live in the sanitary district can be taken into consideration. A road may not benefit certain property in a district. In the *Browning case,* it did not. It is a matter of common knowledge that odor from human excrement in a fairly thickly settled community will affect all around, the shifting wind makes it offensive in the entire district. The water and sewer eliminates this condition not only the annoyance, but the danger that comes from the fly feeding on filth and carrying the germ and thus pollute and poison food and drink. A water and sewer system eliminates the breeding places. It is a well known medical fact that filth breeds typhoid fever and the fly carries the germ. See *Storm v. Wrightsville Beach, supra.* The anopheles mosquito causes malaria, the stegomyia mosquito carries yellow fever and another spreads the Asiatic cholera. That fleas on rats communicate the dreaded bubonic plague. Hence, every protection in California was taken to prevent the rats from leaving incoming ships during the plague. Water, sewer, drainage and screening have been of untold value to the human family. Many parts of this country once almost uninhabitable have been reclaimed. The work in Cuba and the Panama Canal Zone are monuments to the skill of the physician, backed up by the authority of law. See *Snell v. Chatham,* 150 N. C., 729, 736; *Godfrey v. Power Co.,* 190 N. C., 24.

The statute provides also a hearing after notice to the landowners, both before the board or boards of county commissioners of the county or counties in which the land is situate and the State Board of Health. In the present action there was no complaint by any landowner at either hearing that his land would not be benefited by the formation of the sanitary district, and with full notice and knowledge, at the election the vote *was unanimous for the issuance of the bonds.*

Appellants contend the act is unconstitutional "because the statute requires the State Board of Health to include or exclude an industrial plant and its contiguous village, in accordance with the application of the owners of such plant and village." We do not see how this would affect the constitutionality of the act. If the industrial plant and its contiguous village is excluded on application, the sanitary district would be lessened of the burden. If it is included it helps bear the burden of the sanitary district. No doubt this provision was written in the act as it is a matter of common knowledge that many industrial plants and their contiguous villages already have water and sewer systems. If they did, they could be excluded, if they did not they could come in and help bear the burden and get the benefits. We think the levy authorized by chapter 100, Public Laws 1927, is a general tax, as distinguished from a special assessment, and is, therefore, not limited by the amount of benefits conferred by the proposed improvements.

We think, in the present case, there is a difference from the *Browning case, supra,* involving roads or a transportation proposition. A sanitary matter, such as this, involves the very life and health of a community. The whole matter under the act is largely under control of the State Board of Health, an agency of the government, that has charge of the administration of the public health. 2 C. S., chap. 118; 3 C. S., chap. 118, "Public Health."

As stated, the act is carefully drawn for the purpose of promoting the public health and welfare—an important function of government. As said in *Reed v. Engineering Co., supra,* at p. 45: "We think the present act is one of great benefit to rural communities. With good roads in the State, many are moving from the crowded cities and towns to the country. Water and sewer is of great value to a home, and is a necessity. The expense is often more than the individual can afford, but a community or group, under the present law as applicable to Buncombe County, can all join in one sewer system and lessen the cost to the individual home owners. It is of vital importance to improve rural conditions and encourage, by every means possible, living conditions in the country. It was not the intention of the framers of the constitutional amendments and those who voted for them to prohibit such beneficent and constructive legislation applicable to an entire county."

The Buncombe County idea is extended by the present act, to the whole State. Pure water is the very life of a people. It is a matter of common knowledge that the use of Artesian wells has been of beneficial result in recent years to the health of the people in the eastern part of this State. See *Rouse v. Kinston,* 188 N. C., 1; 35 A. L. R., p. 1203.

Dr. Wm. J. Mayo, in an address before the American Chemical Society in St. Louis, said, in part: "Simultaneously with Vienna's introduction of a pure-water supply from the mountains, her per capita consumption of spirituous and fermented liquor was reduced spontaneously 40 per cent. The introduction of a pure-water supply in the various states in our country has been followed by a temperance movement, and finally by prohibition. The same influence is now apparent in Europe. In England pure water is to be had in the large cities, and a temperance movement promptly results, but in the villages without potable water, no such movement is as yet manifest." This is the view of a leading physician, before a great organization. It is worthy of consideration. The conscience of man to help his fellow-man no doubt will be considered primarily the motive power behind the temperance movement, but it stands to reason that pure water is nature's natural beverage—life and health giving.

In *Rouse v. Kinston, supra* (at p. 23), it is said: "We find in Dalton's Human Physiology (7 ed.), p. 36: 'According to the best calculations, water constitutes in the human subject about 70 per cent of the entire bodily weight. . . . In accordance with the results formerly obtained by Barral—that, for a healthy adult man, the average quantity of water introduced into the system is about 2,000 grammes a day.' It is necessary to sustain human life. It is needful in agriculture and industry."

The General Assembly passed this act, no doubt with the coöperation of the State Board of Health, composed of physicians eminent in their profession, who have at heart the health of the people of the State. Courts do not lightly declare an act unconstitutional.

It is said in *Comrs. v. Assell,* 194 N. C., at p. 419: "It has been long settled that no court would declare a statute void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. The philosophy of our system of government is based on the consent of the governed, subject to constitutional limitations."

The act seems to be economically sound. Section 17 of the act is as follows: "Upon the creation of a sanitary district and after each assessment for taxes thereafter the board or boards of county commissioners of the county or counties in which the sanitary district is located shall file with the sanitary district board the valuation of assessable property within the district. The sanitary district board shall then determine the amount of funds to be raised for the ensuing year in excess of the funds available for surplus operating revenues set aside as provided in section twenty of this act to provide payment of interest and the proportionate part of the principal of all outstanding bonds, and to retire all outstanding certificates of indebtedness. The sanitary district board shall determine the number of cents per $100 necessary to raise the said amount and so certify to the board or boards of county commissioners. The board or boards of county commissioners in their next annual levy shall include the number of cents per $100 so certified by the sanitary district board in the levy against all taxable property within the district, which tax shall be collected as other county taxes are collected and every ninety days the amount of tax so collected shall be remitted to the sanitary district board and deposited by said board in a bank in the State of North Carolina separately from other funds of the district. Said bank, however, before said funds are deposited in it is to execute a proper surety bond as described in section fifteen for the proper care and disbursement of and accounting for said taxes."

Section 20. "A sanitary district board shall immediately upon the placing into service of any of its works apply service charges and rates which shall, as nearly as practicable, be based upon the exact benefits derived. Such service charges and rates shall be sufficient to provide funds for the proper maintenance, adequate depreciation, and operation of the work of the district. Any surplus from operating revenues shall be set aside as a separate fund to be applied to the payment of interest on bonds, to the retirement of bonds or both. As the necessity arises the sanitary district board may modify and adjust such service charges and rates from time to time."

"The police power is that inherent and plenary power in the State over persons and property, when expressed in the legislative will, which enables the people to prohibit all things inimical to comfort, safety, health, and the welfare of society, and is sometimes spoken of as the law of overruling necessity." Illinois Law Review, June, 1928, at p. 186.

The act is sane, sound and sensible—well within the police power of the State to pass. Therefore we think that chapter 100, Public Laws 1927, is constitutional, and that the proposed bonds under said act are valid and binding obligations of the Druid Hills Sanitary District, and are payable from an *ad valorem* tax against all the taxable property within the boundaries of said district, and that the judgment of the court below should be

Affirmed.

L. J. HASS ET AL. v. FRANCES E. HASS, J. A. GAITHER, ADMINISTRATOR OF MARY E. HASS, DECEASED, AND THE STATE SCHOOL FOR THE BLIND AND DEAF.

(Filed 6 June, 1928.)

1. **Wills—Construction—Designation of Devisees and Legatees—Ambiguity—Charitable Institutions.**

   A devise to a State charitable institution will not be defeated for a mistake in the name, when the institution, existing under statutes which have slightly changed its name from time to time, was generally known, when the devise was made, under the name designated in the will.

2. **Same—Charitable Institutions—Judicial Notice.**

   The courts will take judicial notice of the name of an institution incorporated by the General Assembly for charitable purposes, and a slight error in the name of the institution in a devise will not defeat the gift if the intent of the testator as to the particular institution of that character is made to appear either by a construction of the writing or proper extrinsic evidence.

3. **Same—Evidence.**

Where a State charitable institution, incorporated by statute, and generally known at the time by a particular name, the use of this name by the testator is evidence that he intended this institution as the beneficiary, especially when there is no similar institution in existence.

4. **Wills — Construction — Estates and Interests Created — Presumption Against Intestacy.**

A devise of "all of my property, both real and personal" to A. for life, with a later item "Whatever remains of my estate" to B. where there is no other disposition of the estate, vests the remainder in both the real and personal property in B.

5. **Same—Restraint Upon Alienation—Charitable Institutions.**

Where a devise in remainder "it is my will that my real estate not be sold, but that the rents and profits for ninety-nine years be paid" to the authorities of a charitable institution for the use of the inmates, vests a fee simple absolute in the trustees for the use of the charity, being either the intent of the testator, or the limitation being void as an attempted restraint upon alienation.

APPEAL by plaintiffs from *Finley, J.*, at January Term, 1928, of CATAWBA. Affirmed.

Civil action for the recovery from defendant, Frances E. Hass, of damages for the wrongful cutting by her of timber on land described in the complaint, and for the construction of the last will and testament of Mary E. Hass, deceased, in order to determine the title to said land, as between plaintiffs, heirs at law of Mary E. Hass, and defendants, other than J. A. Gaither, administrator, claiming under said will.

By consent, the facts involved in the controversy were found by the court from the evidence.

From the judgment upon the facts found by the trial court plaintiffs appealed to the Supreme Court.

A. A. Whitener and Jesse C. Sigmon for plaintiffs.

Attorney-General Brummitt, Assistant Attorney-General Nash, and W. C. Feimster for defendant, the State School for the Blind and Deaf.

CONNOR, J. Mary E. Hass died in Catawba County, North Carolina, on or about 30 March, 1923. On 21 August, 1894, she executed a paper-writing sufficient in form to constitute, and purporting to be her last will and testament. This paper-writing has been duly probated as her last will and testament, first in common form by the clerk of the Superior Court of Catawba County, and, thereafter, upon caveat by plaintiffs herein, as heirs at law of Mary E. Hass, in solemn form by judgment of the Superior Court of said county. Plaintiffs herein, and defendant, Frances E. Hass, are the heirs at law of Mary E. Hass, deceased. Eliza M. Hass, a sister of Mary E. Hass, named as one of the legatees and devisees in said last will and testament, died prior to the death of the testatrix, Mary E. Hass.

The items of the last will and testament of Mary E. Hass, deceased, material to the consideration and decision of the questions presented by this appeal, are as follows:

"1. I will, devise and bequeath unto my beloved sisters, Frances E. Hass and Eliza M. Hass, after the payment of my debts and funeral expenses, including tombstones, all my property, both real and personal, to have, hold, use and possess the same, free from the control of all persons and jurisdictions whatsoever, during their natural lives, or the life of the survivor.

"2. It is my will and desire that whatever remains of my estate, after the death of my sisters, be paid to the authorities in control of the Deaf, Dumb and Blind Asylum of the State of North Carolina, for the use and benefit of the indigent children therein, born blind, of the Caucasian race. It is my will that my real estate be not sold, but that the rents and profits for ninety-nine years be paid to the authorities aforesaid, for the blind children aforesaid.

"3. I hereby exclude L. J. Hass, his heirs or devisees from any and all share or interest in my estate.

"4. Upon my death, I direct my executor, hereinafter named, to collect all debts due me, and after paying funeral expenses as aforesaid, and costs of executing this will, he is to pay over and deliver whatever remains to my sisters or the survivor."

The executor named in said will died prior to the death of the testatrix. The personal estate of the said Mary E. Hass, deceased, was administered by defendant, J. A. Gaither, as her administrator *c. t. a.* He has paid all the debts of the testatrix, and all the costs and expenses of administration. He has duly filed his final account as administrator *c. t. a.* of said Mary E. Hass, and has paid to defendant, Frances E. Hass, the sum of $1,200, in accordance with the provisions of Item 4 of said will.

At the date of her death, the said Mary E. Hass was seized in fee and in possession of a tract of land containing 125 acres, situate in Catawba County, on the hard-surfaced highway about two miles south of the town of Newton. Defendant, Frances E. Hass, has entered into possession of said tract of land, claiming a life-estate therein, under the provisions of Item 1 of said will. She has cut and sold valuable timber from said land. Plaintiffs, as heirs at law of Mary E. Hass, allege that the cutting and sale of said timber from said land by defendant, Frances E. Hass, was unlawful and wrongful; they demand judgment that they recover of said Frances E. Hass damages for such unlawful and wrongful cutting, contending that as heirs at law of Mary E. Hass, they are the owners, and entitled to possession of said land, notwithstanding the paper-writing which has been probated as the last will and testament of Mary E. Hass, or, if this contention is not sustained, in any event, that they are the owners of an estate in remainder in said land, after the death of Frances E. Hass, and that the defendant, the State School for the Blind and Deaf, at most, has only an estate for years therein, after the death of Frances E. Hass, the life tenant, under the will. Manifestly, the right of plaintiffs to recover damages of defendant, Frances E. Hass, for cutting and selling timber from the land described in the complaint, involves the question presented by this appeal, with respect to the title to said land. The answer to this question must be determined by a construction of the last will and testament of Mary E. Hass. The court below, in accordance with its opinion as to the proper construction of said will, ordered, decreed and adjudged as follows:

"1. That under said will the defendant, Frances E. Hass, takes and is entitled to a life estate in all the property of which the said Mary E. Hass died seized and possessed.

"2. That under said will the defendant, the State School for the Blind and Deaf, takes and is entitled to an estate in fee simple absolute, in remainder, after and upon the termination of the said life estate of the said Frances E. Hass, in and to all the property of which the said Mary E. Hass died seized and possessed.

"3. That the second sentence in Item 2 of said will is an attempted restraint upon the alienation of said property, and that the same is therefore void and of no effect, and that upon the death of Frances E. Hass, the defendant, the State School for the Blind and Deaf, will obtain and have full title in fee simple absolute to said property, and full control thereof without restraint or restriction upon its use, sale, or other disposition.

"4. That the plaintiffs have no right, interest or title in and to any of the property of which the said Mary E. Hass, died seized and possessed."

It was thereupon further adjudged that plaintiffs and the sureties on their prosecution bond pay the costs of this action to be taxed by the clerk.

Upon their appeal from the foregoing judgment to this Court, plaintiffs rely upon assignments of error, based upon their exceptions to findings of fact made by the trial court, and also to certain portions of said judgment. They did not except to that portion of said judgment in which it is adjudged that Frances E. Hass, under the will of Mary E. Hass, takes and is entitled to a life estate in all of the property of which the testatrix died seized and possessed, including the land from which it was admitted that she had cut and sold valuable timber.

At the date of the execution of the last will and testament of Mary E. Hass, to wit, 21 August, 1894, there was no corporation or institution in existence, having as its legal name, or official designation, "The Deaf, Dumb and Blind Asylum of the State of North Carolina." Plaintiffs, therefore, contended that Item 2 of said will, by which the testatrix expressed her will and desire that whatever remained of her estate, after the death of her sisters, named in Item 1, be paid to the authorities in control of said asylum, is void, for that "said paper-writing undertakes to bequeath and devise property and land to an alleged institution, which in fact does not now exist, and which never has existed."

With respect to this contention, the court found the facts as follows: "3. Upon a consideration of all the evidence, the court further finds that the defendant, the State School for the Blind and Deaf, is the same corporation and entity which on 21 August, 1894, had the official title and designation of 'The North Carolina Institution for the Education of the Deaf, Dumb and the Blind,' and that by the expression 'The authorities in control of the Deaf, Dumb and Blind Asylum of the State of North Carolina,' in Item 2 of the said last will and testament of Mary E. Hass, deceased, the said testatrix intended and meant 'The North Carolina Institution for the Education of the Deaf, the Dumb and the Blind,' now the defendant, 'The State School for the Blind and Deaf.' "

In *Ryan v. Martin,* 91 N. C., 464, speaking of a deed in which the grantee was a corporation, *Merrimon, J.,* said: "A corporation name is essential, but the inadvertent or mistaken use of the name is ordinarily not material, if the parties really intended the corporation by its proper name. If the name is expressed in the written instrument, so that the real name can be ascertained from it, this is sufficient; but if necessary, other evidence may be produced to establish what corporation was intended. And the same rule applies to devises and bequests to corporations. A misnomer of a corporation has the same legal effect as a misnomer of an individual."

Upon this authority it might well have been held that no evidence was required to show that the institution, to the authorities of which the testatrix willed and desired that whatever remained of her estate, after the death of her sisters, should be paid, was the institution theretofore established and then maintained by the State of North Carolina, for the education of children therein, born blind, for the court would take judicial notice of the existence of such institution, under its statutory name. However, evidence was offered by the defendant, the State School for the Blind and Deaf, to the effect that in 1894, and for many years prior thereto, there was an institution in North Carolina, located in the city of Raleigh, the capital of the State, bearing the statutory name of "The North Carolina Institution for the Education of the Deaf, the Dumb and the Blind," but popularly known, throughout the said State as "The Deaf, Dumb and Blind Asylum." This was then and is now the only institution in the State of North Carolina, either public or private, established and maintained for the education and care of blind children of the white race. The legal name, or official designation of said institution has been changed, from time to time, by statute. It is now a corporation under the name and style, as prescribed by statute, of "The State School for the Blind and Deaf," and is under the management and control of a board of directors and superintendent. C. S., 5872.

Plaintiffs excepted to the evidence offered by the defendant and to the finding of the facts as above stated, upon the ground that it did not appear that the testatrix, a resident of Catawba County, ever knew or spoke of the institution at Raleigh. She was, however, a citizen of the State, and the evidence to the effect that the institution at Raleigh was generally known, throughout the State, as the "Deaf, Dumb and Blind Asylum," was sufficient to support the finding that she intended and meant said institution when she used the name appearing in Item 2 of her will. The principle upon which extrinsic evidence is held to be admissible to identify the legatee, devisee or beneficiary named in a will, where there is a latent ambiguity, is stated and applied in *Ladies Benevolent Society v. Orrell, ante,* 405. This principle is well settled by authoritative decisions of this Court, as applicable not only to wills, but also to deeds. *Gilbert v. Wright, ante,* 165; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273; *Keith v. Scales,* 124 N. C., 497; *Tilley v. Ellis,* 119 N. C., 233. The distinction between a patent ambiguity and a latent ambiguity, and the principle upon which evidence is admissible in the latter case, but not in the former, to show the intent of the parties to a written instrument, is discussed in the leading case of *President, etc., of the Deaf and Dumb Institute v. Norwood,* 45 N. C., 65, by *Pearson, J.* Plaintiffs' assignments of error based upon their exceptions to the admission of evidence, over their objections, to show that testatrix, Mary E. Hass, by the use of the words "The Deaf, Dumb and Blind Asylum of the State of North Carolina" intended and meant the institution now bearing the name, prescribed by statute, of "The State School for the Blind and Deaf," and to the finding of facts with respect thereto, cannot be sustained, either upon principle or upon authority.

Plaintiffs further assign as error that portion of the judgment in which it is ordered, adjudged and decreed "that under said will defendant, the State School for the Blind and Deaf, is entitled to an estate in fee simple absolute, in remainder, after and upon the termination of the said life estate of the said Frances E. Hass, in and to all the property of which the said Mary E. Hass died seized and possessed."

By Item 1 of the said will, all of her estate, both real and personal, is devised and bequeathed by the testatrix to her sisters, during their natural lives, or the life of the survivor. Item 2 of said will deals with, and expresses the will and desire of the testatrix with respect to whatever remains of said estate, after the death of her said sisters. It is clear, we think, that testatrix, in Item 2, was dealing with and disposing of the same estate as that which she had by Item 1 bequeathed and devised to her sisters for life, excepting only so much thereof as had been consumed by her said sisters during their lives. This exception manifestly is applicable to the personal estate only. It is her will and desire that the real estate which she had devised to her sisters for life, should at their death, or at the death of the survivor, go to the authorities in control of the Deaf, Dumb and Blind Asylum of the State of North Carolina, for the use and benefit of the indigent children therein, born blind, of the Caucasian race. There was no error in the construction of said will, by which it was ordered, adjudged and decreed "that defendant, the State School for the Blind and Deaf is entitled to an estate in fee simple absolute, in remainder, after and upon the termination of the said life estate of the said Frances E. Hass, in and to all the property of which the said Mary E. Hass died seized and possessed." This construction of said will is supported by the decision in *Foil v. Newsome,* 138 N. C., 115, on defendant's appeal. It is said in the opinion in that case: "The presumption that a testator intended not to die intestate in regard to any part of his estate is strengthened by the use of language so inclusive as that found in this item of the will." The words "my estate" used in the first sentence of Item 2 of the will in this case is all inclusive, and embraces both real and personal estate.

It follows from the foregoing decision that there was no error in further adjudging "that the plaintiffs have no right, interest or title in and to any of said property of which the said Mary E. Hass died seized and possessed."

Inasmuch as upon a proper construction of all the provisions of said will defendant, the State School for the Blind and Deaf, is the owner of the property, both personal and real, absolutely and in fee simple, of which Mary E. Hass was seized and possessed, at her death, subject only to the life estate of Frances E. Hass, in the same, plaintiffs, heirs at law of Mary E. Hass, have no right, title, interest or estate in and to the land from which the said life tenant has cut and sold valuable timber; the plaintiffs, therefore, cannot maintain an action to recover damages for the cutting and sale of said timber. Defendant, the State School for the Blind and Deaf, alone can maintain such action, and recover of the life tenant damages, if any have resulted from such cutting and sale of timber by her.

The second sentence in Item 2 of said will, to wit: "It is my will that my real estate be not sold, but that the rents and profits for ninety-nine years be paid to the authorities aforesaid for the blind children as aforesaid," if construed as an attempt to restrain the alienation of the real estate, devised in fee to the defendant, the State School for the Blind and Deaf, is of no legal effect and is void in law. *Latimer v. Waddell,* 119 N. C., 370. These words may be construed as merely expressing the wish of the testatrix, without any intention on her part to affect the title to or estate in the land devised in fee simple to defendant, the State School for the Blind and Deaf, for the use and benefit of the indigent children of the State, born blind, of the Caucasian race. *Springs v. Springs,* 182 N. C., 484; *Carter v. Strickland,* 165 N. C., 69. But however these words may be construed, there was no error in the judgment that said words have no legal effect with respect to the title to said real estate devised to defendant, the State School for the Blind and Deaf. The said defendant holds title to the land described in the complaint in fee simple as trustee for the indigent children of the State, born blind, of the Caucasian race. This is a charitable trust and is valid. *Ladies Benevolent Society v. Orrel, ante,* 405; Public Laws 1925, ch. 264.

Plaintiffs' assignments of error are not sustained. The judgment is

Affirmed.

PEOPLES BANK AND TRUST COMPANY AND J. S. MACKORELL, RECEIVER OF THE PEOPLES BANK AND TRUST COMPANY, v. R. J. MACKORELL AND T. M. MACKORELL.

(Filed 6 June, 1928.)

1. Fraudulent Conveyances—Transfers and Transactions Invalid—Insolvency—Questions for Jury.

A contract made in consideration of support by the son of his father and mother for life for one hundred dollars and certain shares of stock of the father, of the value of seven thousand dollars, and the father has not retained sufficient property out of which to pay his then existing creditors, and the son has acted in good faith without notice or knowledge, the transfer of the stock to the son is not valid as against his father's creditors beyond the amount he has previously expended for the support, and for which he was liable under the terms of the contract, and where issues raising this question have been tendered, refused, and exceptions entered, and this phase of the evidence in the case has not been presented to the jury, a new trial will be ordered on appeal. C. S., 1009.

2. **Same—Knowledge of Grantee.**

When the father has entered into a contract with his son for support of himself and wife for life, and gives as a consideration certain of his property, without retaining sufficient property to pay his then existing creditors, and the pleadings and evidence raise the question of the son's good faith and part performance without notice, these questions should be submitted to the jury upon appropriate issues.

APPEAL by defendants from *Schenck, J.*, at September Term, 1927, of CATAWBA. New trial.

H. R. Mackorell made and executed a note dated York, S. C., 1 May, 1924, due 1 November, 1924, for $3,000 to the Peoples Bank and Trust Company, with 8 per cent interest from maturity. On the back of the note appears the following: "Demand notice and protest waived. (Signed) R. J. Mackorell." H. R. Mackorell, after the execution and delivery of the note to plaintiff bank, was duly adjudicated a bankrupt, and Geo. W. Williams, the trustee in bankruptcy, paid on the note two dividends, one a 10 per cent $300, 10/11/24, and one a 5 per cent $150, 8/20/25. The estate of the bankrupt has been fully administered. J. S. Mackorell was duly appointed receiver of the Peoples Bank and Trust Company by the Court of Common Pleas for the county of York, S. C., and made a party plaintiff by order of the judge of the Superior Court of Catawba County, N. C. There is now due, owing and unpaid on the note $3,000, less the payments above mentioned, and interest. That before the delivery of the note to said bank R. J. Mackorell, the defendant, became the endorser, and it is alleged was justly indebted to plaintiff in said amount above set forth. It is alleged by plaintiff that the defendants, R. J. and T. M. Mackorell own no real estate and no personal property in excess of personal property exempt by law, except that defendant R. J. Mackorell owns 75 shares of the par value of $100 of the capital stock of the Hickory House Furnishing Company, a corporation; that R. J. Mackorell, to hinder, delay and defeat plaintiff's rights, is threatening and attempting to sell said stock to his son T. M. Mackorell, a defendant in this action; that R. J. Mackorell is taking out of the business large sums in excess of his salary and depleting the assets in order to defeat plaintiff's rights; that T. M. Mackorell claims an interest by the attempted transfer; that inasmuch as defendants do not own any real property or any personal property of value in excess of the exemption allowed by law, except the said 75 shares of stock owned by defendant, R. J. Mackorell, the plaintiff alleges that the transfer of same by the defendants, or either of them, by sale or otherwise, would work great and irreparable injury and damage to plaintiff.

The prayer is for judgment on the balance of the note and defendants be "enjoined and restrained from transferring or attempting to transfer, or doing any act in aid or furtherance of an attempt to transfer said 75 shares of stock or any part of same, and that they have any other or further relief to which they may be entitled herein."

The material part of the answer for the decision of the case on the present record concerns the answer of both defendants, R. J. and T. M. Mackorell, that sets up an agreement by which R. J. Mackorell sells, assigns, transfers and sets over the stock, 70 shares, to T. M. Mackorell, reciting a consideration of $100, and to support and provide for R. J. Mackorell and his wife the balance of their lives and the life of the survivor of them, who are advanced in years. The agreement was made some fourteen months before this action was instituted, T. M. Mackorell giving his bond for $7,000 to faithfully perform the agreement; that T. M. Mackorell had no notice or knowledge that an action was contemplated. (We construe this to mean that he had no notice of R. J. Mackorell's alleged indebtedness to plaintiff.)

It was in evidence that the above contract was being carried out by T. M. Mackorell. The defendant, T. M. Mackorell, tendered the following issue, which was refused by the court below:

"Was the defendant, T. M. Mackorell, a holder in good faith and for value, of the seventy shares of stock mentioned in the pleadings?"

The issues submitted to the jury and their answers thereto were as follows:

"1. In what sum, if any, is the defendant, R. J. Mackorell, indebted to the plaintiffs on the note sued on? Answer: $2,550, and interest 8 per cent per annum from 1 November, 1924.

"2. Did the defendant, R. J. Mackorell, on or about 17 September, 1924, transfer and assign seventy shares of stock in the Hickory House Furnishing Company to his codefendant, T. M. Mackorell? Answer: Yes.

"3. If so, was said transfer made upon consideration of the future support and maintenance of said R. J. Mackorell and wife by his son, the codefendant, T. M. Mackorell? Answer: Yes.

"4. If so, did defendant, R. J. Mackorell, fail to retain property fully sufficient and available for the satisfaction of his then creditors? Answer: Yes."

T. M. Mackorell, among other things, testified: "I bought this stock without any knowledge that my father had signed a note for my brother, H. R. Mackorell. I didn't know anything about the note."

The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and other necessary facts will be set forth in the opinion.

J. A. Marion and Self & Bagby for plaintiff.
A. A. Whitener for R. J. Mackorell.
Louie A. Whitener and T. Manly Whitener for T. M. Mackorell.

CLARKSON, J. "In *Aman v. Walker,* 165 N. C., 224, 227, 81 S. E., 162, it was held that the principles to be deduced from the authorities as to fraudulent conveyances, are (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration, and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void. *Black v. Sanders,* 46 N. C., 67; *Warren v. Makely,* 85 N. C., 12, 14; *Credle v. Carrawan,* 64 N. C., 422, 424; *Worthy v. Brady,* 91 N. C., 265, 268; *Savage v. Knight,* 92 N. C., 493, 498; *Clement v. Cozart,* 112 N. C., 412, 420, 17 S. E., 486; *Hobbs v. Cashwell,* 152 N. C., 183, 188, 67 S. E., 495; *Powell Bros. v. McMullan Lumber Co.,* 153 N. C., 52, 58, 68 S. E., 926." Michie's N. C. Code, Anno., p. 385; *Tire Co. v. Lester,* 190 N. C., 411; *Wallace v. Phillips, ante,* 665. See C. S., 1005, 1006, 1007, 1008, 1009.

There can be no dispute that the contract between the father and son, in the present action, there being no mistake or fraud, both being *sui juris,* is a valid and binding one. The record indicates it is being carried out in accordance with its terms. As between the parties, the question of adequacy of consideration ordinarily is not material in the absence of fraud. *Young v. Highway Com.,* 190 N. C., 52. On the subject it may be of interest to quote from Shirley's Leading Cases in the Common Law, 3d ed., p. 1: " 'Farmer Whitacre,' said the cunning Thornborrow, 'let us strike a bargain. If I pay you a five-pound note down now, will you give me 2 rye corns next Monday, 4 on the Monday week, 8 on the Monday fortnight, and so on—doubling it every Monday—for the year?' Whitacre jumped at it; five pounds never were earned so easily. So the thing was settled. But when our yokel friend came to calculate how much rye he should have to deliver, he found that it came to more than was grown in a year in all England. Thornborrow, however, brought his action, and succeeded; for the court said that 'though the contract was a foolish one, it would hold in law.' There was a consideration, and as for the other point raised for the defendant, that it was an impossible contract, it was only impossible in respect to the defendant's ability." *Thornborrow v. Whitacre,* 2 Ld. Raym., 1164 (1705).

There are now modifications and exceptions to the harsh rule—where a contract is extortionate and unconscionable as to indicate mistake and fraud. An instance of such a bargain is where one bought a horse and agreed to pay a penny for the first nail in his shoes and to double each time for every other nail. *Williams v. Chaffin,* 2 Dev., 13 N. C., at p. 335. So, where a contract is so extortionate and unconscionable on its face as to raise a presumption of fraud or to require but slight additional evidence to justify such presumption, it will not be enforced—for instance, the famous contract of the United States government to pay sixty cents a pound for shucks worth at the time 1¾ cents per pound. *Hume v. U. S.,* 132 U. S., p. 406; Mordecai's Law Lectures, 2 ed., p. 112.

C. S., 1007, is as follows: "No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observation as may be right and proper."

The stock—$7,000—was assigned, transferred and set over from the father to the son. The consideration was $100, and to support and provide for the father and his wife the balance of their lives and the life of the survivor of them. The book value of the stock is $1.10 on the dollar.

Under C. S., 1009, a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor. See *Cox v. Wall,* 132 N. C., 730.

In Bigelow on Fraudulent Conveyances, Revised Edition, at p. 545, it is said: "The courts are not agreed in regard to the effect of undertakings by a grantee to support a debtor-grantor by way of consideration for the conveyance of all or a large part of the grantor's estate. In New York, Illinois, and elsewhere, it is held that such a case does not make the valuable, or rather the valuable and bona fide, consideration required by the statute to cut off the claims of creditors of the grantor. . . . (p. 547). The exclusion of such a consideration should not rest upon the ground that it may not be valuable, but rather on the ground that, being in effect of the nature of a trust or reservation to the exclusion of creditors or of a trust or a reservation in favor of some one apparently having no estate in the property, and seldom appearing of record, the consideration lacks good faith. This is shown directly by some of the cases, and indirectly by others. The real question then is, whether the nature of the proposed consideration should fix upon the grantee the duty of inquiry concerning the effect of the transaction. See *Sturdivant v. Davis,* 31 N. C., 365; *Kissam v. Edmundson,* 36 N. C., 180; *Cansler v. Cobb,* 77 N. C., 30; *Worthy v. Brady,* 91 N. C., 265; *Eddleman v. Lentz,* 158 N. C., 65; *Shuford v. Cook,* 169 N. C., 52; *Bank v. Pack,* 178 N. C., 388."

We think the principle applicable in the present action is thus stated: "It has in some jurisdictions been held that where the grantee has in good faith furnished support, he may be reimbursed for the same when the conveyance is set aside (or be held liable merely for value of the land beyond that of the support furnished)." *Bigelow, supra,* at p. 546, note, citing authorities.

The subject, with full annotations, is set forth in *Cherry Co. v. Helms,* 98 Neb., 626, 2 A. L. R., p. 1436; *Smith v. Clark,* 23 A. L. R., p. 582.

It is contended by defendant, T. M. Mackorell, that in compliance with the contract made with his father, that he in good faith bought the stock, without notice or knowledge of his father's indebtedness; that he paid out and became responsible for (1) The sum of $100, paid at the time of the sale and transfer; (2) the sum of $350, which he became liable on for money borrowed for his father; (3) the sum of $77.55 in cash given to his father from time to time; (4) the sum of $1,044.48 on which he is now liable to the corporation for advances to his father; (5) money expended for groceries for his father and approximating (at the time of the trial in the lower court) $80.00.

We think the issues submitted practically correct, so far as they go, but under the facts and circumstances of this case the issue tendered by defendant, as modified below, should have been submitted to the jury: "Was the defendant, T. M. Mackorell, a holder in good faith (and for value—stricken out) and without notice of the seventy shares of stock mentioned in the pleadings?" And also an issue: "Did the defendant, T. M. Mackorell, in good faith and without notice, make advances under the agreement with R. J. Mackorell, and if so, in what amount?"

We think the allegations of the complaint, taken as a whole, sufficiently show that the grantor did not retain property fully sufficient and available for the satisfaction of his then creditors, and the motion of defendants for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence, properly refused. C. S., 567. See *Wallace v. Phillips, ante,* 665.

On a new trial the other matters discussed by the parties can be determined on the evidence as presented. For the reasons given, there must be a

New trial.

STATE v. SHERMAN JENKINS.

(Filed 6 June, 1928.)

1. **Arrest—On Criminal Charge—Right of Officer to Use Force to Prevent Escape.**

   An officer of the law may use such force as may appear to him to be reasonably necessary in preventing the escape of one whom he has lawfully arrested, extending to the use of firearms after being attacked by the prisoner with a stick, a deadly weapon.

2. **Same—Questions for Jury.**

   When supported by the evidence the question is for the jury as to whether an officer has used such force as appeared to him reasonably necessary to prevent an escape, or has used such excessive force as to make the use of a pistol a crime under the circumstances.

3. **Same.**

   The extent of the force used by an officer to prevent an escape after arrest does not depend upon the degree of the criminal charge against the one arrested.

4. **Intoxicating Liquor—Searches and Seizures—When Search Warrant Necessary.**

   A search warrant is not necessary to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when under the circumstances the officer had reasonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of section 6, chap. 1, Public Laws 1923.

APPEAL by defendant from *Deal, J.,* at March Term, 1928, of GRAHAM. New trial.

The necessary facts will be stated in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. L. Phillips for defendant.

CLARKSON, J. The defendant was convicted of assault and battery with a deadly weapon upon one Luther Spivey, and from the judgment upon such conviction appealed to this Court.

Luther Spivey was indicted in one bill of indictment for an assault with a deadly weapon on Sherman Jenkins, and Sherman Jenkins was indicted in another bill for assault with deadly weapon on Luther Spivey. By agreement the cases were tried together.

The following seems to be a fair statement of the case as made out by the State. Sherman Jenkins was deputy sheriff of Graham County, and had been such for about four years. Luther Spivey testified himself that he knew Sherman Jenkins. The defendant, Sherman Jenkins, offered to prove by one I. N. Wilson, that he, Wilson, told him, Sherman Jenkins, that Luther Spivey was bringing in liquor and selling it, and if he would watch him he could catch him; that he had been getting some himself. On the early evening of 15 September, 1927, he met Luther Spivey coming up the highway about 75 yards from his house. The lights of the car were right on Spivey, who had in his hand a suitcase apparently full of liquor, and he had a walking stick in the other hand. Jenkins was accompanied by a witness, Wence Orr. On seeing Spivey with this suitcase, he halted him and told him he was under arrest, and that he would have to see what he had in the grip. Spivey knew him and he had, on the outside of his coat, his badge as deputy sheriff. Spivey told him that he could not search the grip without a warrant; thereupon he sent Orr after a warrant. When Spivey started walking up the road the defendant, Jenkins, walked in front of him. Thereupon Spivey stepped off the banks into the woods and went down the mountain and undertook to go up the river. Jenkins told Spivey that he had taken that suitcase as far as he was going to, and he went to take hold of it, having his pistol in his hand at the time. Spivey struck him with a stick about the size of a round of a chair, and thereupon Jenkins shot at him. One of the shots took effect in the hip of Spivey. Spivey contradicted this evidence of Jenkins as to the time when he was shot in the hip and claimed that he did not strike Jenkins at the time that he was shot, but later on when he had gone about a quarter of a mile. According to Jenkins' testimony, Spivey, in the fight, dropped the suitcase which he thought had in it liquor. Near a branch right where Spivey entered the brush toward the river, a suitcase was found. It had four half-gallon cans of whiskey in it and four big apples. This was testified to also by Bob Jenkins, the magistrate, and Wence Orr. Spivey denied that this suitcase was his, and claimed that he had nothing in the suitcase that he was carrying except clothes. It appears that Spivey was carrying a suitcase loaded with liquor for the purpose of sale.

Without treating consecutively the exceptions of the defendant's counsel on this appeal, there can be no doubt, we think, under the decisions of this Court, that the defendant, Jenkins, had authority to arrest Spivey when he met him coming along the road with a suitcase loaded as this suitcase was, particularly when his attention had been directed to Spivey specifically as a man who was selling liquor in the camp, and if he would watch out for him he would find him transporting it or selling it. *All he need show is satisfactory reasons for his belief that Spivey was in his presence breaking the law by transporting spirituous liquors. Neal v. Joyner,* 89 N. C., 287.

In *S. v. McAfee,* 107 N. C., at p. 816, it is said: "If the assault with the stick described was committed in the presence of the officer, Severs, and he was known to the defendant to be a justice of the peace, it was not unlawful to arrest without informing the offender of the nature of the charge, as well as without warrant. 3 Whart. Cr. L., sec. 2829. We concur with the judge below in the view expressed in his charge that, if the defendant struck his wife with the stick described by the witness at a point so near to the officer that he could distinctly hear what was said and the sound made by the blow, it would be considered in law a breach of the peace in his presence, though he could not at the time actually see the former, because it was too dark. *S. v. Hunter,* 8 Lawyers' Reports, 530, and notes." *Neal v. Joyner, supra; S. v. McNinch,* 90 N. C., 695; *Martin v. Houck,* 141 N. C., 317; *Brewer v. Wynne,* 163 N. C., 322; *S. v. Fowler,* 172 N. C., 910; *S. v. Blackwelder,* 182 N. C., 899; *S. v. Campbell,* 182 N. C., at p. 914.

The defendant, Jenkins, had arrested Spivey, and Spivey was then in his custody. When Spivey told him that he could not search his suitcase without a search warrant, he had a right to hold Spivey until the search warrant came. It is necessary to remember that Spivey was under arrest.

In *S. v. Dunning,* 177 N. C., 559, at p. 562, *Hoke, J.,* says: "It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged, and if he is withstood, his authority and purpose being made known, he may use the force necessary to overcome resistance and to the extent of taking life if that is required for the proper and efficient performance of his duty. It is when excessive force has been used maliciously or to such a degree as amounts to a wanton abuse of authority that criminal liability will be imputed. The same rule prevails when an officer has a prisoner under lawful arrest and the latter makes forcible effort to free himself; and, in this jurisdiction, the position holds whether the offense charged be a felony or a misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority and not dependent, therefore, on the grade of the offense. These views are in accord with numerous decisions of our Court in which the questions presented were directly considered—as in *S. v. Sigman,* 106 N. C., 728; *S. v. McMahan,* 103 N. C., 379; *S. v. Pugh,* 101 N. C., 737; *S. v. McNinch,* 90 N. C., 695; *S. v. Garrett,* 60 N. C., 144; *S. v. Stallcup,* 24 N. C., 50."

The limits of the authority of an officer to use a deadly weapon to stop a fleeing prisoner are also set out: *S. v. Simmons,* 192 N. C., 692; *Holloway v. Moser,* 193 N. C., 185.

According to Jenkins' own testimony, he did not fire upon Spivey until he (Spivey) had made an attack upon him with a deadly weapon. He was entitled to have the question submitted to the jury (1) upon his good faith—*S. v. McNinch,* 90 N. C., 695; (2) whether he used force more than necessary to the proper performance of his duty—*S. v. Garrett,* 60 N. C., 144; *S. v. Sigman,* 106 N. C., 728; (3) whether he shot in self-defense—*S. v. Allen,* 48 N. C., 257; *S. v. McKinsey,* 80 N. C., 458; *S. v. Garrett, supra.* In this last named case it is said: "The warrant must be executed peaceably if you can, forcibly if you must."

We do not think the proviso to section 6, chapter 1, Public Laws 1923, applicable here. Section 6, in reference to transporting intoxicating liquor, says: *"In any wagon, buggy, automobile, water or air craft or other vehicle."* A suitcase carried in one's hand along a public highway would not be an "other vehicle" within the meaning of the statute. The proviso then, "that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant, duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage" has no application to the situation presented upon this appeal. The "baggage" of the proviso, refers to baggage accompanying or in the vehicle transporting the intoxicating liquor. If it should be considered otherwise it would totally disregard the controlling context of section 6. See *S. v. Godette,* 188 N. C., p. 497. The facts in this case are entirely different from those cases in which officers, upon mere suspicion and without knowledge, assaulted innocent persons. *S. v. Simmons, supra; S. v. DeHerrodora,* 192 N. C., 749.

Black's Law Dictionary, 2d ed., p. 112, defines *Baggage:* "In the law of carriers. This term comprises *such articles of personal convenience or necessity as are usually carried by passengers for their personal use,* and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such *as a sale and the like.* The term includes whatever the passenger takes with him *for his personal use or convenience according to the habits or wants of the particular class to which he belongs,* with reference to the immediate necessities or ultimate purpose of the journey," citing numerous authorities. (Italics ours.)

"By 'baggage' is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunk of a passenger, but which are not, however, designed for such use, but for other purposes, such as sale and the like. Articles consisting of a sample liquor cooler, one beer faucet, one wrench, and one lemon squeezer, which were samples carried by a passenger in his trunk for the purpose of effecting sales do not constitute baggage." *Texas, etc., R. Co. v. Capps,* 2 Willson Civ. Cas. Ct. App., sec. 33. See *Winder v. Penniman,* 181 N. C., 7.

Bob Jenkins, a justice of the peace, testified: "We found this suitcase or traveling bag where Jenkins said Spivey jumped off; it had four one-half gallon cans of whiskey in it, about one-half pint was gone from one." The defendant testified: "The suitcase which Spivey was carrying was the kind that is usually used by bootleggers for carrying liquor."

It could hardly be said, by strained construction of the statute, that a "suitcase or traveling bag" with four one-half gallon cans of contraband liquor in it was *baggage,* under the definition of baggage as above defined.

Among the many assignments of error, the defendant excepted and assigned error to the following portion of the charge of the court below: "However, I have been compelled to instruct you as a matter of law under the evidence, that the defendant, Jenkins, did not have a right to make an arrest under the circumstances shown in this case." We think this was error, for the reasons given. It may not be amiss to say that the able, learned and frank Assistant Attorney-General, Mr. Nash, concedes there was error in the charge of the court below. There must be a

New trial.

C. C. CHEEK v. M. R. WALDEN AND J. J. HARPER.

(Filed 6 June, 1928.)

Homestead—Property Constituting Homestead—Equity of Redemption—Execution.

A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Const., Art. X, secs. 2, 8; C. S., 728, 729, 730, 731, 745.

APPEAL by plaintiff from *Webb, J.*, at .... Term, 1928, of RANDOLPH. Reversed.

The court below found the following facts:

"1. That at July Term, 1926, of Randolph County Superior Court, the defendant, M. R. Walden, obtained judgment against the plaintiff, C. C. Cheek, for the sum of $200, as will appear on judgment docket Book 24, page 13, in the office of the clerk of the Superior Court of Randolph County; that said judgment was docketed within ten days of said term of court, and was from that time a lien on the real estate of C. C. Cheek, situated in Randolph County.

"2. That at March Term, 1927, of said Superior Court of Randolph County, the defendant, J. J. Harper, recovered judgment against plaintiff, C. C. Cheek, for the sum of $330, together with costs, which said judgment was duly docketed in the Superior Court of Randolph County, within ten days of the adjournment of said term, in judgment docket Book 24, page 81, and the same was a lien on the land of C. C. Cheek, situated in Randolph.

"3. That thereafter, and while said judgments were a lien on the real estate of C. C. Cheek in Randolph County, the said C. C. Cheek and wife, Annie Cheek, on 2 May, 1927, executed and delivered to the Bank of Ramseur a mortgage deed on the land described in the complaint, which is situated in Randolph County, for the sum of $2,300, and said mortgage deed was recorded on 12 May, 1927, in the office of the register of deeds for Randolph County, in Book 229, pages 143, 144.

"4. That said mortgage deed was executed according to the laws of the State of North Carolina, and the private examination of Annie Cheek, wife of C. C. Cheek, was duly taken.

"5. That on 10 December, 1927, the defendants, W. R. Walden and J. J. Harper, issued executions against the plaintiff on the aforesaid judgments for the amount specified in said judgments, and delivered said executions to the sheriff of Randolph County.

"6. That J. A. Brady, sheriff of Randolph County, levied on the lands of C. C. Cheek, by virtue of said executions, it being the same land that is described and contained in the mortgage deed aforesaid, from C. C. Cheek and wife, Annie Cheek, to the Bank of Ramseur, on 2 May, 1927, hereinbefore referred to, and advertised the same for sale on 6 February, 1928, at the courthouse door in Asheboro, N. C., and is attempting to sell said land without allotting the homestead or personal property exemptions of the said C. C. Cheek; that on 29 December, 1927, the plaintiff brought this action and restrained the defendants from selling said lands without allotting the homestead or personal property exemptions of plaintiff, C. C. Cheek, and demanding that the sheriff of Randolph County be required to allot the homestead and personal property exemption of the plaintiff; that no homestead has heretofore been allotted to C. C. Cheek.

"It is therefore considered, ordered and adjudged that the restraining order heretofore issued against the defendants in this cause be, and the same is hereby dissolved."

C. N. Cox and Brittain, Brittain & Brittain for plaintiff.
Hammer & Wilson, J. A. Spence and H. M. Robbins for defendants.

CLARKSON, J. The plaintiff, a resident of the State, owns certain real property. Judgments are taken by defendants against him and duly docketed on the judgment docket of the Superior Court of the county in which the land is situate, which became a lien on his real property, under C. S., 614. Thereafter he and his wife, in accordance with law, made a mortgage on the land. No homestead has heretofore been allotted to plaintiff. Can plaintiff claim a homestead in the equity of redemption? We think so.

Const. of N. C., Art. X, sec. 2, is as follows: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

Article X, sec. 8: "Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

The material part of C. S., 728: "The homestead and personal property exemptions as defined and declared by the article of the State Constitution entitled Homesteads and Exemptions are exempt from sale under execution and other final process, as provided in the State Constitution: *Provided,* the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead," etc.

C. S., 729: "The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the Constitution, Article X, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect."

C. S., 730, in part: "Before levying upon the real estate of any resident of this State who is entitled to a homestead under this article, and the Constitution of this State, the sheriff or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath," etc.

C. S., 731: Duty of appraisers; proceedings on return. C. S., 732: Reallotment for increase of value. C. S., 733: Appeal as to reallotment. C. S., 734: Provides for levy on excess of the homestead. C. S., 735, provides if selection is not made by the owner, or any one acting in his behalf, appraisers shall make selection for him, "including always the dwelling and buildings used therewith."

It is well settled that the homestead may be allotted in *an equity of redemption. Cheatham v. Jones,* 68 N. C., 153; *Gaster v. Hardee,* 75 N. C., 460; *Burton v. Spiers,* 87 N. C., 87; *Hinson v. Adrian,* 92 N. C., 122; *Thurber v. LaRoque,* 105 N. C., 301; *Montague v. Bank,* 118 N. C., 283; *Duplin Co. v. Harrell, ante,* 445.

In *Cheatham v. Jones, supra,* at p. 155, it is said: "A mortgage is a mere incumbrance upon a man's land, given as a security for the debts therein set out; and if he can discharge the incumbrance by the sale of the land outside of his homestead, or in any other way, creditors who are not secured by the mortgage, have no ground upon which to deprive him of the homestead secured by the Constitution. We are of opinion that a debtor is entitled to a homestead in an 'equity of redemption,' subject to the mortgage debts, just as a purchaser in possession is entitled to a homestead, subject to the payment of the purchase money."

In *Stevens v. Turlington,* 186 N. C., at p. 196, "for all other purposes the mortgagor is regarded as the owner of the land." The rights of the mortgagor is thoroughly discussed in the *Stevens case, supra.*

It will be seen by the Constitution and Acts of the General Assembly that every safeguard is given the homesteader, and the courts have carefully protected his rights as guaranteed by the Constitution. The law favors the homestead. Misfortune overtakes the best—sickness, ill health, deflation. Those who framed the Constitution realized this and provided for a homestead exemption. This exemption does not destroy the creditor's debt, but extends the enforcement so that the debtor and his wife and minor children, as provided by the Constitution, shall have an earthly habitation.

J. Howard Payne's "Home, Sweet Home" is a benediction to humanity:

> "'Mid pleasures and palaces though we may roam,
> Be it ever so humble, there's no place like home;
> A charm from the skies seems to hallow us there,
> Which sought through the world is ne'er met with elsewhere.
>
> An exile from home splendour dazzles in vain,
> Oh give me my lowly thatched cottage again;
> The birds singing gayly, that came at my call,
> Give me them, and that peace of mind dearer than all."

Upon conveyance by the homesteader, the exemption ceases. *Chadbourn Sash Door and Blind Co. v. Parker,* 153 N. C., 130; *Watters v. Hedgpeth,* 172 N. C., 310; *Duplin Co. v. Harrell, supra.*

In *Simmons v. McCullin,* 163 N. C., at p. 412, it is said: "It has been held for a long time, and in many cases that the wife's joinder is not required unless there is a judgment docketed and in force, which is a lien upon the land, or unless the homestead has been actually set apart. Const., Art. X, sec. 8; *Mayho v. Cotton,* 69 N. C., 289; *Hughes v. Hodges,* 102 N. C., 249; *Scott v. Lane,* 109 N. C., 155; *Joyner v. Sugg,* 132 N. C., 580; *Rodman v. Robinson,* 134 N. C., 503; *Shackleford v. Morrill,* 142 N. C., 221." *Dalrymple v. Cole,* 170 N. C., 102; *Hall v. Dixon,* 174 N. C., 319.

Under certain circumstances the homesteader is estopped from claiming the homestead exemption. *Caudle v. Morris,* 160 N. C., 168; *Simmons v. McCullin, supra; Duplin County case, supra.*

The defendants had no right to have the sheriff to levy on plaintiff's land—the equity of redemption—and advertise his property under executions to enforce their judgment liens, without first having allotted to plaintiff a homestead in the manner provided by the statute. The homestead can be allotted on petition of the owner. C. S., 745. In fact, C. S., 749, is as follows: "Any officer making a levy, who refuses or neglects to summon and qualify appraisers as heretofore provided, or fails to make due return of his proceedings, or levies upon the homestead set off by appraisers or assessors except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for the costs and damages in a civil action." The judgment below is

Reversed.

SOUTHERN RAILWAY COMPANY v. CHEROKEE COUNTY AND B. B. MORROW, TAX COLLECTOR.

(Filed 6 June, 1928.)

1. **Municipal Corporations—Minutes of Meeting of County Commissioners—Power to Correct—Taxation.**

   The board of commissioners of a county may correct the minutes of a levy of taxes formerly made by it to show separately the items relating to current county expenses and the items of levy for authorized special purposes when no change in the former levies are thereby made.

2. **Taxation—Constitutional Requirements and Restrictions—Restrictions of Amount of Taxes County May Levy—Current Expenses—Constitutional Law.**

   A tax levied by the county commissioners for the aged and infirm, to pay jurors, for feeding and caring for the county prisoners are expenses to be paid from the general county fund as current expenses, and fall within the limitations of Article V, sec. 6, of the State Constitution.

3. **Same—Power of the General Assembly to Validate.**

   A subsequent validating act of the Legislature cannot cure an invalid levy of taxes for general county expenses made under a former statute.

APPEAL by plaintiff from *Sink, Special Judge,* at June Term, 1927, of CHEROKEE. Reversed.

Controversy submitted on agreed statement of facts. The necessary facts will be stated in the opinion.

Julius C. Martin for plaintiff.
J. H. McCall and D. Witherspoon for defendants.

CLARKSON, J. This is an injunctive proceeding, brought by the Southern Railway Company against the Board of Commissioners for the County of Cherokee and its Tax Collector, to restrain the collection of certain taxes assessed or levied by said board, which are alleged to be illegal or invalid. *R. R. v. Comrs.,* 188 N. C., p. 265; *Bond v. Tarboro,* 193 N. C., p. 248; *Hunt v. Cooper,* 194 N. C., 265. A judgment denying the injunctive relief and declaring the tax levied legal and valid was rendered and plaintiff excepted, assigned error and appealed to the Supreme Court.

On 5 July, 1926, the board of county commissioners for the county of Cherokee, at its regular session, levied certain taxes for the fiscal year 1926. The levies in controversy are set forth on the minutes of the board as follows:

"For general county purposes we do hereby levy a tax of 55 cents on each one hundred dollars worth of property.

"For the support of the aged and infirm we do levy a special tax of 4 cents on the one hundred dollars worth of real and personal property.

"For the paying of jurors and State's witnesses, we do levy a special tax of 3 cents on each one hundred dollars worth of property.

"For the purpose of feeding the county prisoners and providing for their common welfare in the county jail, we do levy a special tax of 3 cents on each one hundred dollars of property."

The plaintiff contends that said board of commissioners attempted to levy on the property of this plaintiff taxes "for general county purposes" at the rate of 55 cents on each one hundred dollars valuation of its property situated in said county, and the plaintiff contends that 40 cents of the amount of said tax on each one hundred dollars valuation of said property is unlawful and unconstitutional, for that the Constitution of North Carolina, Article V, section 6, provides: "The total of the State and county tax on property shall not exceed 15 cents on the one hundred dollars value of property except when the county property tax is levied for a special purpose and with the special approval of the General Assembly which may be done by special or general act." That 10 cents on each $100 valuation of its said property is unlawful and void and is not authorized by any statute or law applicable thereto; that said 10 cents of taxes is made up of taxes as follows, according to the records of said board of commissioners: (a) For aged and infirm, 4 cents; (b) for jury tax, 3 cents; for feeding prisoners, 3 cents; total, 10 cents.

The board of county commissioners of Cherokee County, all its members being present, at the regular session held on 7 February, 1927, concerning the tax assessment or levy, the record and minutes are as follows: "Whereas, it appears to the satisfaction of the board of county commissioners of Cherokee County, North Carolina, that when the tax levy was ordered and made by the board on 5 July, 1926, for general county purposes, for school purposes, for special purposes and the paying of interest on outstanding bonds, including necessary sinking fund, which were made separately, there was a mistake and error in putting the levy on the minutes of the said board in adding the 15 cents for the general county purposes, which tends to show a levy of 55 cents for the general county purposes, while it should show, viz.:

For general county purposes we do levy 15 cents on $100 worth of real and personal property.

For the purpose of taking care of the interest and creating a sinking fund on a $28,000 funding bond we do levy 1 cent on the $100 worth of real and personal property.

For the purpose of taking care of the interest and creating a sinking fund on $60,000 courthouse and jail bonds issued 1 October, 1922, we do levy a tax of 6 cents on each $100 worth of real and personal property.

For the purpose of creating a sinking fund and paying the interest on $28,000 road and bridge bonds issued 1 May, 1920, we do levy a tax of 3 cents on each $100 worth of real and personal property.

For the purpose of paying the interest and taking care of a sinking fund on $50,000 road and bridge bonds issued 1 November, 1923, we do levy a tax of 5 cents on each $100 worth of real and personal property.

For the purpose of paying and creating a sinking fund on $200,000 Cherokee County road and bridge bonds issued 1 April, 1925, we do levy a tax of 15 cents on each $100 worth of real and personal property.

For the purpose of paying interest on $200,000 courthouse bonds of Cherokee County, we do levy a tax of 10 cents on each $100 worth of real and personal property.

It is further ordered by the board with all members present at the regular February meeting, 1927, of said board on 7 February, 1927, this minute and this order be spread upon the record of the minutes of the said board, thereby correcting the error which was made in placing this levy on the minute at the July Term, 1926, of the said board."

The levy on 5 July, 1926, was recorded on the minutes of the board "for general county purposes we do hereby levy a tax of 55 cents on each $100 worth of property." The minutes of 7 February, 1927, in the preamble sets forth "there was a mistake and error," and the latter part says "thereby correcting the error." The record does not change the amount, but gives in detail the special purposes. In the agreed statement of facts the acts of the General Assembly and Consolidated Statutes are all set forth authorizing the issuance of the bonds for special purposes. The amendment is in the nature of a bill of particulars showing the special purposes. It was in no sense a new levy. We think the principle well settled that a correction of the minutes to speak the truth can be made as in the present case. *R. R. v. Reid,* 187 N. C., 320; *R. R. v. Forbes,* 188 N. C., 151; *Oliver v. Comrs.,* 194 N. C., 380. To err is human.

It goes without saying that the board of county commissioners of the respective counties should, in performance of the public duty committed to them, keep minutes of the tax levies showing in detail the special purpose the tax is levied to meet, the interest and annual payments on the serial bonds, or the sinking fund required. The money so collected for these special purposes should be applied solely for that levied and not misapplied for general county purposes or current expenses. In this we heartily concur with the plaintiff.

The serious question—10 cents was levied as follows: 4 cents for aged and infirm, 3 cents to pay jurors and State's witnesses, 3 cents for feeding county prisoners and providing for their welfare. Are these special purposes, or are they such running current expenses for general county purposes for which the Constitution provides a levy of 15 cents to meet? They are generally regarded as current expenses.

The amount allowed to be levied not to exceed 15 cents on the $100 worth of property. Const., Art. V, sec. 6. These are current expenses of the county. Public-Local Laws 1927, ch. 201, applicable to Cherokee County, cannot validate a void levy. *R. R. v. Cherokee,* 194 N. C., 781. It may be that the General Assembly could pass a special act or general law allowing a levy for special purposes of this kind in emergency cases.

Counties must live within their income, as provided by the Constitution. It is admitted by defendant county in its brief that the funding bonds should be $10,000, and was incorrectly stated $28,000. This should be corrected and the tax levy reduced. Public-Local Laws 1911, ch. 238, under which the tax was levied, says "An amount not to exceed $12,000."

For the reasons given, the judgment below is

Reversed.

W. B. HUNTINGTON ET AL. v. SARAH PHARR DENNIS AND HER HUSBAND, HAROLD D. DENNIS ET AL.

(Filed 6 June, 1928.)

Deeds and Conveyances—Construction and Operation—Restrictions.

Restrictive covenants in a deed to lots of land, a part of a residential development as to the costs of dwellings thereon, does not obligate the grantee, who erects an apartment house thereon, to make the cost of each apartment not less than the designated amount as to separate dwellings.

APPEAL by defendants from *Harding, J.,* at April Special Term, 1928, of MECKLENBURG. Reversed.

Action to enjoin defendants from erecting on a lot of land owned by defendants, Sarah Pharr Dennis and her husband, Harold D. Dennis, an apartment house, upon the allegation in the complaint that the erection of said house upon said lot will be a violation of restrictive covenants contained in deeds under which said defendants hold title to said lot of land.

From judgment overruling the demurrer of defendants to the complaint, defendants appealed to the Supreme Court.

John M. Robinson, T. A. Adams and Whitlock, Dockery & Shaw for plaintiffs.

Fred B. Helms and Taliaferro & Clarkson for defendants.

PER CURIAM. Defendants, Sarah Pharr Dennis and her husband, Harold D. Dennis, are the owners of a lot of land situate in "Myers Park," a residential section of the city of Charlotte, N. C. They hold title to said lot of land under deeds containing restrictions pertinent to the decision of the questions involved in this appeal, in words as follows:

"(1) The property shall be used for residential purposes only and shall be occupied and owned by members of the white race only."

"(7) Any residence erected on the property shall cost not less than $7,500 and shall be at least two stories in height above the basement."

The foregoing restrictions are applicable to the lot now owned by defendants, Sarah Pharr Dennis and her husband, Harold D. Dennis. They were first inserted in the deed by which the plaintiff, the Stephens Company, conveyed the said lot, together with other lots to Myers Park Homes Company. Said defendants derive title to the lot now owned by them from the Myers Park Homes Company. Reference is expressly made to said restrictions in the deed by which said lot was conveyed to said defendants, who are now the owners of the same. The said lot is included in and is a part of a tract of land originally owned by the Stephens Company, and subdivided by said company into lots which have all been conveyed for residential purposes, according to a general plan and scheme, in furtherance of the development of said tract of land as a high-class residential section. All of said lots were conveyed by deeds containing restrictions similar to those applicable to the lot now owned by said defendants. Title to said lots is now held by the owners subject to said restrictions. Plaintiff, W. B. Huntington, is now the owner of a lot which is included in and is a part of the same block in Myers Park which includes the lot now owned by defendants, Sarah Pharr Dennis and her husband, Harold D. Dennis. It is expressly provided in the deed from the Stephens Company to Myers Park Homes Company, under which both plaintiff, W. B. Huntington, and said defendants claim title to the lots now owned by them, respectively, that the covenants, conditions and restrictions contained in said deed shall be deemed to run with the land thereby conveyed.

Defendants, Sarah Pharr Dennis and her husband, Harold D. Dennis, as owners of said lot, and their codefendant, Lex Marsh and Lex Marsh Company, as contractors and builders, at the date of the institution of this action, had commenced the erection on said lot of an apartment house. Said house will contain thirty rooms, divided into eight separate apartments or residences, and will cost, when completed, about $28,000.

Plaintiffs allege that the erection of said apartment house on said lot by defendants will be a violation of the restrictions applicable to said lot, for that said property will not be used for residential purposes only, and for that, further, the cost of each of the separate apartments in said house will be less than $7,500, to wit, on an average of about $3,500.

Defendants by their demurrer admitted the facts to be as alleged in the complaint. The facts alleged therein material to a decision of the questions involved in this appeal are as above set out. The Court was of opinion that said facts constitute a cause of action upon which plaintiffs are entitled to the relief prayed for. Judgment was thereupon rendered that the demurrer be and the same was overruled. From this judgment, defendants appealed to this Court.

The restriction that the lot owned by defendants, Sarah Pharr Dennis and her husband, Harold D. Dennis, shall be used for residential purposes only, will not be violated by the erection on said lot of an apartment house as described in the complaint. Said apartment house, when erected on said lot, will be used for residential purposes only. It does not appear that it will be used, or is designed for use for any other purpose. Under *Delaney v. VanNess,* 193 N. C., 721, no cause of action is alleged in the complaint founded upon a violation of the restriction applicable to the lot owned by said defendants with respect to the use of said lot.

In *Bailey v. Jackson,* 191 N. C., 61, it was held that an apartment house is not a residence in contemplation of a restrictive covenant not to build more than one residence on a certain lot. In reference to the present controversy it is contended that each apartment of the proposed apartment house will constitute a separate residence; that the cost of each residence will be less than $7,500, to wit, on an average about $3,500; and that in this way the covenant set out in section (7), *supra,* will be violated. We are of opinion, however, that the manifest purpose of this section is to prevent the erection of a building which shall cost not less than $7,500, and not to require that each apartment shall cost at least this amount, thereby making the total cost of the building not less than $60,000. Judgment

Reversed.

BENNY THOMAS HYATT, BY HIS NEXT FRIEND, ANNIE STILES HYATT, v. W. L. MCCOY.

(Filed 6 June, 1928.)

Contracts—Actions for Breach—Pleadings—Demurrer—Illegitimate Children.

A demurrer to a complaint of an illegitimate son against his putative father upon a contract alleged, but not set out, is bad, the sufficiency of the consideration not appearing, being a question for the jury under the evidence introduced upon the trial. *Burton v. Belvin*, 142 N. C., 151, and *Thayer v. Thayer*, 189 N. C., 502, cited and distinguished.

APPEAL by defendant from *Townsend, Special Judge,* at November Term, 1927, of MACON. Affirmed.

Bourne, Parker & Jones and Horn & Patton for plaintiff.
McKinley Edwards for defendant.

PER CURIAM. The plaintiff alleges that he is illegitimate, that the defendant is his father, and that Annie Stiles Hyatt is his mother. He brought suit to recover a reasonable amount for his support and maintenance during his minority. The basis of the action is a contract alleged to have been made between the defendant and the plaintiff's mother to support, maintain, and educate the plaintiff. The specific terms of the contract are not set out. Nor does it clearly appear whether the alleged contract is supported by a valuable consideration as in *Burton v. Belvin,* 142 N. C., 151 and *Thayer v. Thayer,* 189 N. C., 502, or whether it rests upon an alleged moral obligation to provide for the plaintiff's maintenance. See Annotations in 17 A. L. R., 1299; 25 A. L. R., 635; A. L. R., 434.

The defendant demurred to the complaint; the demurrer was overruled; and the defendant excepted. By demurring the defendant admitted the existence of a contract, and we cannot hold that upon the face of the complaint the contract is not enforceable. Whether it is depends upon the evidence. This is not a proceeding in bastardy, and the other defenses may be interposed at the trial in the several modes provided by law. In this way the merits may be more satisfactorily determined. The judgment overruling the demurrer is

Affirmed.

GRAYSON NICHOLS v. W. L. BRADSHAW ET AL.

(Filed 6 June, 1928.)

1. **Evidence—Competency—Impeaching Witness.**

   Where a witness has testified that he had been indicted for illicit distilling, it is competent to ask him whether he had been convicted, when for the purpose of impeaching his credibility.

2. **Evidence—Competency—Cured Error.**

   Where evidence is erroneously excluded on cross-examination, but evidence of substantially the same character is later introduced on direct examination, the error is cured.

CIVIL ACTION before *Harwood, Special Judge,* at January Term, 1928, of HAYWOOD.

The evidence tended to show that the plaintiff was operating a distillery and that a deputy sheriff duly deputized the defendant to go with him in search of and to arrest the guilty parties. When the officers arrived at the place where the blockading was in progress the plaintiff and his companions attempted to escape. Whereupon the defendant, who was armed with a shotgun, fired upon the plaintiff while he was seeking to make his escape. Seventy-five or eighty shot took effect in plaintiff's back, causing him serious injury. The defendant contended that while he was pursuing one of the parties found at the distillery that he stumbled and fell and his gun was discharged accidentally, and that the injury suffered by plaintiff was the result of such accidental discharge of the weapon.

Proper issues were submitted to the jury and answered in favor of the plaintiff. The verdict awarded plaintiff the sum of $1,500 damage. From judgment upon the verdict the defendant appealed.

W. R. Francis and Alley & Alley for plaintiff.
John M. Queen, Morgan & Ward and M. G. Stamey for defendant.

PER CURIAM. The evidence presented an issue of fact. The plaintiff offered evidence tending to show that the defendant shot him intentionally. The defendant offered evidence tending to show that the shooting was accidental. The verdict of the jury therefore determines the merit of the controversy. The principles of law governing the cause of action are thoroughly settled. *S. v. DeHerrodora,* 192 N. C., 749, 136 S. E., 6; *Holloway v. Moser,* 193 N. C., 185, 136 S. E., 375.

One of the parties who was engaged with the plaintiff in operating the distillery, was a witness for the plaintiff. This witness testified that he was indicted for blockading and was thereupon asked by counsel for the defendant whether or not he was convicted. Plaintiff objected to the testimony and the objection was sustained. This question was competent. *S. v. Lawhorn*, 88 N. C., 634; *S. v. Jeffreys*, 192 N. C., 318, 135 S. E., 32; *S. v. Maslin, ante*, 537. However, on redirect examination the same witness testified that he was convicted and used plaintiff Nichols as a witness upon his trial. It is clear therefore that the error in excluding the testimony with respect to conviction was immaterial. Upon the whole record we are of the opinion that no reversible error appears in the case.

No error.

C. C. REDMON AND ROBELL REDMON, ADMINISTRATORS JAMES W. REDMON, DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 23 June, 1928.)

Railroads—Operation—Injury to Persons on Track—Contributory Negligence—Last Clear Chance.

Where the evidence tends only to show that the plaintiff's intestate was killed while attempting to cross in an auto-truck the defendant's railroad at a grade crossing, in full possession of his faculties, both actual and apparent, without looking or listening or observing the procedure ordinarily required under the circumstances, and this failure alone caused his death, by the collision of his truck with the defendant's train, his contributory negligence bars his recovery as a matter of law, and the issue as to the last clear chance is not presented for the jury to determine in regard to fixing the defendant with liability.

CIVIL ACTION, before *Deal, J.*, at September Term, 1927, of MADISON.

The evidence tended to show that plaintiff's intestate, Redmon, was traveling in a Ford roadster truck on Bridge Street, the car being a left-hand drive. Bridge Street crossed the tracks of the railroad at grade. There is a North Carolina stop sign near the crossing, and the jail and a wholesale house are situated near the tracks. The jail is about forty-seven feet from the track, and the wholesale house about twenty-three feet from the track. Redmon was traveling south. A witness for plaintiff named King was approaching the same crossing and was traveling in a truck behind Redmon. As the witness approached within 15 or 20 feet of the railroad track he attempted to pass Redmon and saw the train coming and stopped his car. Witness said: "I came to a stop and looked back at Redmon's car to see if he was looking—I did not know at the time that he was starting across the tracks—and I turned my head and looked at the train again, and when I looked back at Redmon the train struck him. He was almost across the railroad tracks. . . . The train was something like four rails from Mr. Redmon as he went on the tracks. I think the regular railing is something like 30 to 33 feet. . . . . The train was running, I suppose, or making from 30 to 35 miles. . . . No whistle was blown before that crossing was reached by the train that I heard of; no bell was ringing. . . . The engineer did not make any effort to stop that train before striking Mr. Redmon, that I could tell, and at the time of this accident the engineer was not in the position usually occupied by the engineer. . . . When I was within 25 or 30 feet of the track I saw the train the first time at the upper bridge, I think, there. I don't remember how many steps it was, but it was something like 150 or maybe 175 yards. . . . Redmon was closer to the track than I was, and being ahead of me he could have seen, for at that time his view was clearer than mine. . . . I did not see him look; he was in front of me, and he did not stop his car. He could have seen, at a point 25 feet from the track, a train approaching at 150 or 175 yards."

Witness Andrews, who was an eye witness, testifying for plaintiff, said: "I guess I could have seen up to the depot three or four yards when he got to the track. It was straight. The rails of the track are about 4 feet 8½ inches apart. Redmon's Ford truck was 10 or 11 feet long. Redmon, while at the hospital, told his son that he did not see the train and did not hear any noise at all, and that he did not know he had been hit with the train until afterwards they told him." The collision happened about noon 31 July, 1926, and Redmon died as the result of his injuries on or about 9 August, 1926.

The engineer testified: "When I first saw Mr. Redmon approaching in his automobile, my train was about 125 yards when I first saw him. I guess he was about 30 feet from the railroad track—something like that. I was traveling about 20 or 25 miles an hour, and Mr. Redmon was traveling at a rate of speed of about 4 or 5 miles an hour, going very slow; he was going toward the crossing. When Mr. Redmon drove up on the track I guess I was within 40 feet of the crossing. When he started across in front of me from the time he drove up on the track 40 feet in front of me it was impossible for me to stop my train without hitting his car. . . . My train was coming down the river, down grade, the river grade. My train of 60 cars consisted of, I think, 5 loaded and 55 empties that we had. The size engine I was driving that day was . . . the largest on wheels—the largest type that is used."

Several witnesses testified that signals were given, and others testified that they heard no signal. The engineer testified that: "It takes one, two or three seconds for the brakes to take hold." The engine was

90 feet long, and the cars from 36 to 38 feet. There was no evidence as to the distance in which a train of this character and making the speed testified to, could have been stopped except the statement of the engineer that after putting on brakes he stopped about 150 yards from the crossing. A witness, Watson, who was a brakeman in the employ of the defendant at the time, apparently testified in a former trial that in his opinion a train going 45 miles an hour could be stopped within a distance of 100 to 150 yards, but the same witness modified the statement by saying that he had not run an engine, and was asked to give an estimate and stated: "I can't give my opinion as to a train going 35 miles an hour; I don't mean I won't give it; I don't know; I have no opinion about it."

At the conclusion of the evidence the defendant tendered the usual issues of negligence, contributory negligence and damages. The court, however, submitted an issue as to last clear chance, and the defendant excepted. The jury found that the defendant was guilty of negligence, and that the plaintiff was guilty of contributory negligence, and further found the issue of last clear chance in favor of plaintiff and awarded damages in the sum of $3,500.

From the judgment upon the verdict the defendant appealed.

John H. McElroy, Charles B. Marshburn and Mark W. Brown for plaintiff.

Thomas S. Rollins for defendant.

BROGDEN, J. When must the trial judge submit an issue of last clear chance to the jury? The last clear chance doctrine is the duty imposed by the humanity of the law upon a party to exercise ordinary care in avoiding injury to another who has negligently placed himself in a situation of danger. The doctrine is said to have sprung from the celebrated case of *Davies v. Mann,* 10 M. & W., 546, decided in 1842, and is commonly known as the hobbled ass case. An excerpt from that case is as follows: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." The principle announced has been clearly stated by *Stacy, J.,* in *Haynes v. R. R.,* 182 N. C., 679, 110 S. E., 56, as follows: "It has been held uniformly with us that, notwithstanding the plaintiff's contributory negligence, if the jury should find from the evidence that the defendant, by the exercise of ordinary and reasonable care, could have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the defendant would be liable in damages." To the same effect is the utterance of *Brown, J.*, in *Cullifer v. R. R.*, 168 N. C., 309, 84 S. E., 400: "It is well settled in this State that where the plaintiff is guilty of contributory negligence the defendant must exercise ordinary care and diligence to avoid the consequences of the plaintiff's negligence, and if by exercising due care and diligence the defendant can discover the situation of the plaintiff in time to avoid injury, the defendant is liable if it fails to do so." Again in *Ray v. R. R.*, 141 N. C., 84, 53 S. E., 622, *Hoke, J.*, said: "The authorities are to the effect that if the plaintiff is at the time rightfully upon the track or sufficiently near it to threaten his safety, and is negligent, and so brought into a position of peril, if the defendant company by taking a proper precaution and keeping a proper lookout could have discovered the peril in time to have averted the injury by the exercise of proper diligence, and negligently fails to do it, the defendant would still be responsible, though the plaintiff also may have been negligent in the first instance."

The application of the principle was denied in *Herring v. R. R.*, 32 N. C., 402, although the case of *Davies v. Mann* was cited in the brief. The *Herring case* involved the killing of a slave who was asleep on or near the track and not at a crossing. *Pearson, J.*, observed: "If both are in equal fault, if one can recover so can the other, and thus there would be mutual faults and mutual recoveries, which would contradict the saying 'that law is the perfection of reason.'" The *Herring case*, however, was overruled in *Deans v. R. R.*, 107 N. C., 686, 12 S. E., 77. The *Deans case* expressly adopted and applied the principle of *Davies v. Mann.*

The legal basis of the principle has created a wide divergence of opinion among text-writers and courts of last resort. In *Neal v. R. R.*, 126 N. C., 634, 36 S. E., 117, it was held that last clear chance and proximate cause are synonymous terms, the Court saying: "The doctrine of proximate cause—the last clear chance—is firmly established in this State, and we have no idea of abandoning or in any way disturbing it." In the *Neal case* an issue as to last clear chance was submitted, but the trial judge nonsuited the case, even though the train at the time of the injury was running in violation of ordinances regulating speed and the ringing of the bell. The Court said: "The distinction does not seem to lie so much in the negligence of the parties where both are guilty of negligence, as it does in the condition of the parties, and we think upon examination that it will be found that where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury, and in cases where there was something suggesting to the defendant the injured party's disadvantage or disability—as where the party injured is lying on the railroad track apparently drunk or asleep, or on a bridge or trestle when he could not escape or could not do so without great danger. In such cases, if the engineer saw the party injured or by proper diligence should have seen, the company is liable. It is in such cases as these that the doctrine of proximate cause or the last clear chance is called in to determine the liability." The trial judge in nonsuiting the case gave the following reason for his action: "That notwithstanding the negligence of plaintiff's intestate the defendant might, by ordinary care, have avoided the injury, the evidence, which as to the plaintiff must be believed, clearly showed that notwithstanding defendant's negligence, the plaintiff's intestate by the exercise of ordinary care, might himself, up to the last moment, have avoided the injury. Therefore the negligence of plaintiff's intestate, if not the proximate cause, at least concurred with defendant's negligence, up to the last moment, in together constituting the proximate cause of the injury. The third issue therefore should be answered no, and the plaintiff is not entitled to recover in the action." Again it has been held that: "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." *Clark v. R. R.,* 109 N. C., 430, 14 S. E., 43; *Pickett v. R. R.,* 117 N. C., 616, 23 S. E., 264; *Styles v. R. R.,* 118 N. C., 1084, 24 S. E., 740. In *Baker v. R. R.,* 118 N. C., 1015, 24 S. E., 415, the last clear chance was referred to as "intervening negligence after the careless act of the plaintiff was complete and became a fact accomplished." This expression doubtless means that the negligence of the party injured must have spent itself before the principle of last clear chance would apply. However, in *Norman v. R. R.,* 167 N. C., 533, 83 S. E., 835, this Court held: "The liability of defendant, under the doctrine of last clear chance, did not depend upon the 'cessation or culmination of plaintiff's negligence.' What is meant by the quoted expression, which is used in the instruction, we suppose to be that plaintiff's negligence must have spent its force, or have become dormant or inactive. But this was not necessary to constitute the defendant's negligence the proximate cause of the injury. The very fact that the plaintiff, in the presence of danger, continued to be negligent, and in apparent ignorance of the danger with reference to the car, but increased the duty of the defendant's motorman to be on his guard and to adjust his conduct to that situation by lessening the speed of the car, bringing it under control and generally placing himself in a state of readiness to stop, should it be necessary to do so."

Any apparent contradiction between the *Norman case* and other cases upon the subject disappears in the light of the facts. Norman was backing his car across the tracks of the street railway and attempting to turn around "in apparent ignorance of the danger with reference to the car," and when the motorman could have seen that he was in a dangerous situation and unconscious of his peril.

The question as to whether the doctrine grows out of or is founded upon proximate cause or synonymous therewith has been the subject of extensive and intensive discussion. The decision of this particular case, however, does not require us to enter this field of learning, for the reason that there are certain well established principles of law applicable to last clear chance which are decisive of the merits of the controversy. These principles relating to the application of the doctrine may be stated as follows:

1. The doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence.

2. No issue with respect thereto must be submitted to the jury unless there is evidence to support it. *Ellerbe v. R. R.,* 118 N. C., 1024, 24 S. E., 808.

3. The burden upon such issue, when submitted, is upon the plaintiff. *Cox v. R. R.,* 123 N. C., 604, 31 S. E., 848; *Hudson v. R. R.,* 190 N. C., 116, 129 S. E., 146; *Buckner v. R. R.,* 194 N. C., 104, 138 S. E., 535.

4. The doctrine does not apply to trespassers and licensees upon the tracks of a railroad who, at the time, are in apparent possession of their strength and faculties, the engineer of the train producing the injury, having no information to the contrary. Under such circumstances the engineer is not required to stop his train or even slacken its speed, for the reason that he may assume until the very moment of impact that the pedestrian will use his faculties for his own protection and leave the track in time to avoid injury. *Glenn v. R. R.,* 128 N. C., 184, 38 S. E., 812; *Beach v. R. R.,* 148 N. C., 153, 61 S. E., 664; *Exum v. R. R.,* 154 N. C., 408, 70 S. E., 845; *Abernethy v. R. R.,* 164 N. C., 97, 80 S. E., 421; *Hill v. R. R.,* 169 N. C., 740, 86 S. E., 609; *Davis v. R. R.,* 187 N. C., 147, 120 S. E., 827.

However, if a person is lying on the track asleep or drunk, or the engineer knows that the person on the track is insane or otherwise insensible of danger, or unable to avoid injury by the exercise of ordinary care, it is his duty to resolve all doubts in favor of the preservation of life and limb, and immediately use every means, consonant with the safety of his passengers, to slacken the speed of the train or stop if necessary. *Bullock v. R. R.,* 105 N. C., 180, 10 S. E., 988; *Deans v. R. R.,* 107 N. C., 686, 12 S. E., 77; *Pickett v. R. R.,* 117 N. C., 616,

23 S. E., 264; *Sawyer v. R. R.,* 145 N. C., 24, 58 S. E., 598; *Edge v. R. R.,* 153 N. C., 212, 69 S. E., 74; *Henderson v. R. R.,* 159 N. C., 581, 75 S. E., 1092; *Hill v. R. R.,* 169 N. C., 740, 86 S. E., 609.

5. The doctrine does not apply when the contributory negligence of the injured party bars recovery as a matter of law. Otherwise contributory negligence would totally disappear. *Cooper v. R. R.,* 140 N. C., 209, 52 S. E., 932; *Mitchell v. R. R.,* 153 N. C., 116, 68 S. E., 1059; *Coleman v. R. R.,* 153 N. C., 322, 69 S. E., 129; *Davidson v. R. R.,* 171 N. C., 634, 88 S. E., 759; *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307; *McCullock v. R. R.,* 188 N. C., 797, 125 S. E., 529; *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Pope v. R. R., ante,* 67; *B. & O. R. R. Co. v. Goodman,* 48 S. Ct., 24.

Bearing these principles in mind, it becomes necessary to determine their bearing upon the rights of travelers at public crossings.

It has been uniformly held in this State that a railroad and a traveler have equal rights to a crossing. Thus in *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690, the Court held: "Where a railroad track crosses a public highway both a traveler and the railroad have equal rights to cross; but the traveler must yield the right of way to the railroad company in the ordinary course of the latter's business." *Duffy v. R. R.,* 144 N. C., 26, 56 S. E., 557.

It is also the duty of the railroad company to use due care in giving timely warning of the approach of its train to a public crossing either by sounding the whistle or ringing the bell at the usual and proper place to the end that those approaching or using the crossing may have notice that a train is at hand. A failure to perform this duty constitutes negligence. *Bagwell v. R. R.,* 167 N. C., 611, 83 S. E., 814; *Williams v. R. R.,* 187 N. C., 348, 121 S. E., 608; *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180.

Again in *Rigler v. R. R.,* 94 N. C., 604, the Court said: "When a traveler is approaching a railway crossing, with an unobstructed view of the track in both directions, it is his duty to look both ways, and if he advances to the point of intersection, and attempts to cross in front of the approaching cars, and receives an injury, such conduct will constitute negligence, so as to preclude him from recovering."

In *Bullock v. R. R.,* 105 N. C., 180, 10 S. E., 988, an ox team stalled on the tracks of the railroad. The engineer could see for a distance of 1,070 yards. The Court said: "It was negligence on the part of the defendant, if the engineer could have seen, by watchfulness, though he did not in fact see, that the road was obstructed in time to stop his train before reaching the crossing. . . . It is true that, ordinarily, an engineer has a right to assume that one who has time will get out of the way, but he is not warranted in acting upon this assumption after he 'has reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals.' "

In *Coleman v. R. R.,* 153 N. C., 322, 69 S. E., 129, plaintiff was driving a horse and buggy at a public crossing and was struck by a rapidly moving train. Plaintiff testified that he looked and listened some distance from the right of way and saw no train and heard no signal. The Court held: "The law imposes equal duty upon the traveler when he reaches a crossing and before attempting to go on the track to both look and listen for approaching trains, for the traveler by doing so, if there is nothing in his way, can most certainly prevent a collision and save himself from harm. When he reaches the track, it is no great hardship imposed upon the traveler to require him to exercise ordinary prudence and to cast his eye up and down the track. By so doing he has the last and most certain chance to prevent collisions and save himself as well as the train, its crew and passengers from possible injury. . . .

When must a traveler look? A writer in the Personal Injury Law Journal of July, 1910, declares that all conflicts of opinion on this subject may be avoided by adopting the common-sense rule that the traveler should look when about to enter upon the track." *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598.

Applying the established principles of law to the facts disclosed by the record, it appears that the plaintiff's intestate, in the day time, drove his car upon the tracks of the defendant at a time and place where his vision was unobstructed and when at that instant a long, heavy freight train was rapidly approaching and dangerously near. Indeed, before he had traversed the distance between the rails, to wit, 4 feet 8½ inches, he was struck by the train. The conclusion is irresistible that the train was dangerously near the crossing when the plaintiff's intestate, being at the time under no disability or disadvantage, entered upon the track. We see no evidence in the record which tends to support the issue of last clear chance submitted by the trial judge, and therefore hold that it was error to submit such an issue. Eliminating this issue, the plaintiff is not entitled to recover by reason of the fact that the jury found that plaintiff's intestate was guilty of contributory negligence.

Modified and affirmed.

H. C. SCALES v. WACHOVIA BANK AND TRUST COMPANY, RECEIVER FOR MERCHANTS BANK AND TRUST COMPANY, M. W. NASH, JOHN H. DYER AND WIFE, BERTHA L. DYER, THOMAS MASLIN, METROPOLITAN LIFE INSURANCE COMPANY, WACHOVIA BANK AND TRUST COMPANY.

(Filed 23 June, 1928.)

1. **Pleadings—Demurrer—Misjoinder of Parties and Causes of Action—Fraud.**

Where the complaint against a corporation and others alleges the foreclosure of a mortgage securing a loan by a corporation, bid in at the amount of the loan at a greatly inadequate price, that the corporation continued the loan for its agents in the original amount and the agents sold this equity at a handsome profit, and it generally appears from the plaintiff's allegations that this was done in pursuance of a fixed design of the agents to defraud the plaintiff, with implied notice to the corporation, or that it had sufficient notice to have put it on reasonable inquiry which would have revealed the fraud, and all parties thereto participated in the fraud and received benefits therefrom: *Held*, a demurrer *ore tenus*, made after answers filed, for misjoinder of parties and causes of action is bad.

2. **Same—"Speaking Demurrer."**

A demurrer that depends upon its own material allegations to establish a vital defect in the pleadings objected to, is bad as a "speaking demurrer."

APPEAL by plaintiff from *Stack, J.*, at November Term, 1927, of FORSYTH. Reversed.

The complaint of plaintiff consists of twenty-two pages. The allegations of the complaint are bottomed on two deeds of trust given by plaintiff, a negro man, on or about 19 April, 1923, to the Merchants Bank and Trust Company, trustee (now a defunct banking institution, the defendant Wachovia Bank and Trust Company being the receiver), conveying certain improved real property to secure the payment of $20,000, borrowed from the defendant Metropolitan Life Insurance Company. Two different loans—$12,000 and $8,000. The property is alleged to be worth $50,000. The deeds of trust, it is alleged, were foreclosed and purchased by one of the defendants, M. W. Nash, at the total purchase price of $19,300, the amount due the Insurance Company. New deeds of trust were given by him for about the amount bid at auction sale to the Insurance Company; that the lands were then sold by said Nash, subject to the Insurance Company lien, and the spoils divided between the male defendants, amounting in notes and land estimated at $11,000 over and above the debt to the Life Insurance Company, which was assumed by the purchaser, thus having paid nothing in cash for the property.

It is alleged in detail a fraudulent scheme and conspiracy on the part of all the male defendants connected with the transaction to defraud plaintiff out of his property, and as officers and agents respectively representing the defendant corporations, the corporations had notice and knowledge of the fraud. Minute allegations are made in each step of the alleged fraud and conspiracy and the part played by each defendant, as agents and officers representing the defendant corporations. Actionable fraud is charged against the defendants. It is alleged in detail how each one was active in the transactions "conspired together and formed the deliberate design and purpose to cheat and defraud the plaintiff out of his property." It is alleged that all were parties to the fraud and conspiracy. The corporations had notice through their officers and agents, or with knowledge of the fraud ratified their acts and were benefited by the transaction. The judgment of ejectment suit was alleged to be fraudulent and asked it be declared null and void. The whole tenor of the complaint is to the effect that the defendants Dyer, Maslin and the Merchants Bank and Trust Company, through its officers, Dyer and Maslin, entered into a conspiracy with the defendant Nash to defraud and cheat the plaintiff out of his property, and the complaint specifically alleges that the Metropolitan Life Insurance Company had knowledge, through its duly authorized agents, of these facts at the time of the exchange liens, and complaint further states that as a constituent element of the conspiracy and fraud the judgment was obtained. It is further set out in unequivocal terms the purpose of the conspiracy, and also the benefit received by the Metropolitan Life Insurance Company. It is shown that the Metropolitan Life Insurance Company was in possession of information that would put a reasonably prudent person on notice of the said illegal and unlawful conduct, and that the Metropolitan Life Insurance Company negligently failed to take any step to prevent the perpetration of the fraud, but acquiesced in the undertaking. The complaint then goes on to track part of the funds derived from the perpetration of the alleged fraud.

Every conceivable allegation of conspiracy, fraud and notice are alleged in which all were *particeps criminis,* and the corporations having notice. A division of the profits on the part of the male defendants, the fruits of the fraud and conspiracy.

After filing answers denying the material allegations of the complaint, all of the defendants severally demurred *ore tenus* to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action. The grounds of the demurrer are set forth *seriatim:* (1) Plea in bar—*res judicata*—the judgment in the ejectment suit. (2) The allegations of fraud in the procurement of the judgment are insufficient in law; that it is not alleged that any of the persons who gave false testimony have been convicted of perjury. (3) That the causes of action are inconsistent and irreconcilable. The plaintiff seeks to follow the proceeds of the sale of land in the hands of defendants and in the same action to recover damages. The defendant, Metropolitan Life Insurance Company, assigns additional grounds: That it appears from the complaint that the alleged representations of certain of the defendants were made and done in their individual capacities and not as its agents; that the alleged representations of certain of the defendants who made the representations and did the acts complained of were without the consent or authority of said company and were done for their own benefit and purpose and not for the benefit or on behalf of said company; that in a former action between the same parties, a demurrer was sustained as to said Insurance Company, and the action dismissed and no appeal taken therefrom; thereafter plaintiff submitted to a voluntary nonsuit as to the other defendants and instituted the present action against same defendants, including the Insurance Company.

The several demurrers of the defendants were sustained and the plaintiff's action dismissed. From the judgment sustaining the demurrers, the plaintiff excepted, assigned error and appealed to the Supreme Court.

Richmond Rucker, Ed. F. Cullom and John J. Ingle for plaintiff.

Manly, Hendren & Womble for Metropolitan Life Insurance Company, and Wachovia Bank and Trust Company, Receiver for the Merchants Bank and Trust Company.

M. W. Nash in propria persona.

Ratcliff, Hudson & Terrell for John H. Dyer and wife, Bertha L. Dyer.

Swink, Clement & Hutchins for Thomas Maslin.

CLARKSON, J. *The first proposition.* Plea in bar—*res judicata*—the judgment in the ejectment. This cannot be sustained.

It must be borne in mind that we are not determining the truth or falsity of the facts alleged in the complaint. *The allegations of the complaint are denied by defendants in their answers. These are matters for the determination of the jury.* The defendants demur *ore tenus* to the allegations of the complaint, setting forth, as required by our procedure, the specific grounds. *Seawell v. Cole & Co.*, 194 N. C., p. 546. In such case the rule is well settled and stated in *Ballinger v. Thomas, ante,* at p. 520, as follows: "The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact necessarily deducible therefrom, are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law. *S. v. Bank,* 194 N. C., 436; *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800." *Whitehead v. Telephone Co.,* 190 N. C., p. 197.

The two deeds of trust made by plaintiff to the Merchants Bank and Trust Company, trustee for the Metropolitan Life Insurance Company, to secure two loans, are the original transactions and sources of the controversy. Then a fraudulent scheme and conspiracy is charged, growing out of the foreclosure of these deeds of trust. It extends to the ejectment suit and a link in the chain.

"Fraud is the arch enemy of equity and a court of equity will relieve against a judgment obtained by imposition or fraud." 15 R. C. L., p. 760.

Article IV, sec. 1, of Const. of N. C., in part, is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished, and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action," etc.

"This provision does not imply that the distinctions between law and equity are abolished. Principles of law, principles and doctrines of equity, remain the same they have ever been; the change wrought is in the method of administering them and, in some degree, the extent of the application of them. *Matthews v. McPherson,* 65 N. C., 189; *Lumber Co. v. Wallace,* 93 N. C., 22. The abolition of the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. *Rudisill v. Whitener,* 146 N. C., 403; *Boles v. Caudle,* 133 N. C., 528; *Morisey v. Swinson,* 104 N. C., 555; *Ely v. Early,* 94 N. C., 1." Connor & Cheshire, Const. of N. C. (anno.), p. 147. See, also, *Waters v. Garris,* 188 N. C., 305.

In *Houser v. Bonsal,* 149 N. C., at p. 57, it is said: "But under our present system, where courts are empowered to administer full relief in one and the same action, when all the parties to be affected by the decree are before the courts and a judgment is set up in bar and directly assailed in the proceeding for fraud, this is a direct and proper proceeding to determine its validity." *Mottu v. Davis,* 151 N. C., 237; *Trust Co. v. Bank,* 193 N. C., 528.

The second proposition. The allegations of fraud in the procurement of the judgment are insufficient in law that it is not alleged that any of the persons who gave false testimony have been convicted of perjury. This cannot be sustained.

C. S., 398, is as follows: "Where the violation of a right admits both of a civil and criminal remedy, the right to prosecute the one is not merged in the other."

In an action for *malicious prosecution,* the rule is that it is necessary that the proceeding upon which it is based should have been properly terminated. *Winkler v. Blowing Rock Lines, ante,* 673.

Kinsland v. Adams, 172 N. C., 765, is distinguishable because in that case the complaint did not contain an allegation of fraud, as in the instant case, but only a charge of false testimony of a witness. Here the action of ejectment itself is made a constituent element, a link or circumstance in the alleged conspiracy and fraud of the parties, who are more than witnesses. The *Kinsland case* cites *Moore v. Gulley,* 144 N. C., where at p. 84 it is said: "It is not sufficient to sustain an independent action for relief against the verdict and judgment, unless there has been some *fraudulent conduct* or perjury." As seen in the *Houser case, supra,* this question can be determined in the present action. In *Stelges v. Simmons,* 170 N. C., at p. 45, "no fraud has been alleged."

The third proposition. That the causes of action are inconsistent and irreconcilable. The plaintiffs seek to follow the proceeds of the sale of land in the hands of defendants and in the same action recover damages. This cannot be sustained. The defendants in their brief say "in submitting this proposition the defendants do not concede that the plaintiff, Scales, has set out more than one cause of action."

The following is approved in *Taylor v. Ins. Co.,* 182 N. C., at p. 122: " 'The plaintiff may unite in the same complaint several causes of action when they arise out of the same transaction or transactions connected with the same subject of action, the purpose being to extend the right of the plaintiff to join actions, not merely by including equitable as well as legal cause of action, but to make the ground broad enough to cover all causes of action which the plaintiff may have against the defendant arising out of the same *subject* of action, so that the Court may not be forced "to take two bites at a cherry," but may dispose of the whole subject of controversy and its incidents and corollaries in one action.' *Hamlin v. Tucker,* 72 N. C., 502." *Seawell v. Cole Co., supra.*

The matter complained of by defendants can be determined upon the trial in the court below when plaintiff tenders the issues upon the theory of the cause of action which he relied on. See *Causey v. Morris, ante,* p. 532.

In *Cotten v. Laurel Park Estates, Inc., post,* 848, 141 S. E., 339, it is said at p. 340: "The defendants argue, with persuasive but not convincing reasoning, that there is a misjoinder of causes of action and parties; that the complaint is bad for multifariousness; that the complaint contains inconsistent and contradictory causes of action. We cannot so interpret it. Taking the three causes of action, although artificially set forth, as a whole, not disconnectedly, we think under a liberal construction, 'with a view to substantial justice between the parties,' it is one connected story—a common scheme, or plot, practically a conspiracy. The complaint alleges an actionable fraud of the most nefarious kind, connecting all of the defendants and charging, with particularity, all of them with full knowledge and complicity. The cause of action arises out of the same transaction, or transaction connected with the same subject of action. All flow from the same source; all are woven together, yoked together, in a scheme, plot, or conspiracy to defraud the plaintiff. 'If the fountain is tainted, so, likewise, is the water that flows from it into all the streams,' " citing cases. See *Trust Co. v. Peirce, ante,* 717.

The demurrer of the defendant, Metropolitan Life Insurance Company, cannot be sustained. The language used and the "relevant inference of fact necessarily deducible therefrom" we think sufficient as against the demurrer.

As to any former action, it is said in *Cherry v. R. R.,* 185 N. C., p. 92-93: "A demurrer averring any fact not stated in the pleading which is attacked, commonly called a 'speaking demurrer,' is never allowable," and cases cited. *Murphy v. Greensboro,* 190 N. C., 268; *Brick Co. v. Gentry,* 191 N. C., 636; *Reel v. Boyd, ante,* 273.

From a careful review of the record and authorities, we think the demurrer should have been overruled.

Reversed.

L. W. FLYTHE AND IRENE FLYTHE v. EASTERN CAROLINA COACH COMPANY AND AMERICAN FIDELITY AND CASUALTY COMPANY.

(Filed 23 June, 1928.)

1. **Negligence—Actions—Evidence—Court May Order Plaintiff to Have X-ray Taken for Evidence—Appeal and Error.**

   The trial court has the inherent power to order the plaintiff, in a personal injury negligence case, to submit to having an X-ray taken of the alleged injured part to ascertain the extent of the damage complained of, as a matter to be exercised within his sound legal discretion, with due regard to the rights of both parties to the action, and in the absence of abuse thereof, his action is not reviewable on appeal.

2. Same—Impeaching Witness.

In an action by the wife to recover damages for an alleged negligent personal injury, a question asked the husband as to whether he had objected to the taking of an X-ray, has no impeaching effect as to his wife's testimony, and is properly excluded, and its exclusion is not held under the facts of this case for prejudicial error, as tending to impeach his testimony.

3. Bus Lines—Indemnity Bonds—Liability of Surety.

Where the surety on a bond indemnifying a public auto-bus service against liability for negligent injury, and the bond which is filed with the Corporation Commission under the rules provided by statute, limits the surety's liability to buses run on regular schedules between termini of the line, no recovery can be had against the surety by a person injured by the negligent driving of the bus on a special trip not covered by the terms of the policy of indemnity sued on.

APPEAL by defendants from *Schenck, J.*, at February Term, 1928, of GUILFORD. Modified and affirmed.

Action to recover damages for injuries caused by the negligent operation of a bus, on a State highway, resulting in a collision between said bus and an automobile.

The action was begun and tried in the municipal court of the city of High Point, before Teague, J., and a jury. From judgment rendered by said municipal court on a verdict sustaining the allegations of the complaint, and assessing damages which each of the plaintiffs is entitled to recover of defendants, both defendants appealed to the judge holding the Superior Courts of Guilford County. Their assignments of error were not sustained upon said appeal.

From judgment, affirming the judgment of the municipal court of the city of High Point, defendants appealed to the Supreme Court.

Austin & Turner and Spruill & Olive for plaintiffs.
Gold & York and John W. Hester for defendants.

CONNOR, J. Upon their appeal to this Court, defendants contend that the judgment rendered by the judge of the Superior Court of Guilford County, affirming the judgment of the municipal court of the city of High Point should be reversed, to the end that a new trial shall be had in said municipal court. They contend that there was error in the refusal of the judge to sustain their assignments of error, based upon exceptions taken by them at the trial in the municipal court. Their assignments of error, on the appeal to this Court, are restricted to exceptions pertinent, only (1) to the issue involving the amount which plaintiff, Irene Flythe, is entitled to recover for injuries to her person, and (2) to the issue involving the allegation in the complaint, which is denied in the answers, that the bus, by the negligent operation of which said plaintiff was injured, was, at the time of its collision with the automobile, in which said plaintiff was a passenger, covered by the policy of insurance issued by the defendant, American Fidelity and Casualty Company. No exceptions taken by defendants relative to issues submitted to and answered by the jury, on the trial in the municipal court, involving the liability of defendant, Eastern Carolina Coach Company, to plaintiffs for their respective injuries, are referred to or discussed in the brief filed in this Court, on behalf of defendants. The evidence offered at the trial, tending to establish such liability, is plenary; there is no serious controversy, apparent on the record, as to the liability of said Coach Company, by reason of the negligent operation of its bus by its driver, on a State highway, to each of the plaintiffs—to the plaintiff, L. W. Flythe, for injuries to his automobile, and to plaintiff, Irene Flythe, for injuries to her person. The controversy is chiefly as to the nature and extent of the personal injuries sustained by the plaintiff, Irene Flythe, when the bus owned and operated by defendant Coach Company collided with the automobile in which she was riding as a passenger. There is no contention on defendant's appeal to this Court that there was error in the judgment of the Superior Court in overruling defendants' exceptions taken on the trial in the municipal court relative to the issue involving the amount which plaintiff, L. W. Flythe, is entitled to recover in this action as damages for injuries to his automobile.

It is alleged in the complaint that as the result of the negligent operation of the bus, on the State highway, causing the collision between said bus and the automobile, in which she was a passenger, the plaintiff, Irene Flythe, "was thrown violently forward, and to her right, and against the side of the Franklin automobile, resulting in painful and severe injury to the right hip of plaintiff, Irene Flythe, internally injuring the joints of the same," and that "from said injury she suffered great mental and physical pain, and that she has since suffered great mental and physical pain and anguish; and that from said injury she has been permanently injured, and will forever be disqualified and physically unable to work and enjoy life as heretofore." In their answers, with respect to this allegation, both defendants say that "they are advised and believe, and so allege, that the injury to Irene Flythe was negligible, and consisted principally of a bruise, and is in no manner permanent."

The complaint in this action and the answers thereto were filed in April, 1927. The action came on for trial at the September Term, 1927, of the municipal court of the city of High Point. After the jury had been empaneled, and before any evidence had been offered, defendants moved the court to make an order requiring "the plaintiff, Irene Flythe, to submit to an X-ray examination by reputable physicians or surgeons, of competent skill, and indifferent as between the parties, to be appointed by the court, for the purpose of determining whether or not the injuries complained of by the plaintiff had been inflicted, said X-ray examination to be had at such time and place as may be fixed by the court." Prior to the term of court, at which the action was called for trial, the defendant, Eastern Carolina Coach Company, had filed a petition therein, praying the court to make an order to the same effect. In said petition it is alleged:

"2. That the plaintiff, Irene Flythe, in paragraph seven of the complaint, alleges that she had been injured in the sum of $25,000, and in her prayer demands judgment for said sum of $25,000, all of which this defendant denies upon information and belief.

"3. That this defendant is ignorant of the nature and extent of the injuries complained of; that upon information and belief defendant avers that plaintiff has apparently fully recovered, if she was ever injured; that the injuries (internal injuries to the hip bones) are latent and not perceptible to experts, and that the ends of justice require that the defendant be advised to what extent, if any, the said hip bones have been injured.

"4. That an X-ray examination of plaintiff, Irene Flythe, is material and necessary for the purpose of the trial of this cause and that such examination will subject the said plaintiff to no bodily injury, and the same can be made without any serious pain or danger to plaintiff.

"5. That plaintiff, through her counsel of record, has been requested to submit to an X-ray examination of the parts of her anatomy which she claims have been seriously and permanently injured, and plaintiff through her counsel has refused to submit to such an examination; that plaintiff, through her counsel, has also refused to give her consent to an order of this court for such an examination to be made by a reputable physician or surgeon of competent skill and indifferent between the parties, to be selected by this court.

"6. That the evidence which said X-ray examination would disclose can be acquired in no other way and that justice to the defendant cannot be done unless an X-ray examination of her can be had."

While this petition had been filed some months before the term of the court at which the action was called for trial, no order had been made with respect thereto; the petition was not called to the attention of the court until after the jury had been empaneled. The motion for the order, requiring plaintiff to submit to the X-ray examination, was then made and heard by the court for the first time. The motion was denied, and defendants excepted. Defendants on their appeal to this Court assign as error the refusal of the judge of the Superior Court to sustain their assignment of error, based upon this exception, on their appeal from the judgment of the municipal court of the city of High Point to the judge of the Superior Court of Guilford County.

It has been generally held in other jurisdictions that a trial court has the power to require the plaintiff in an action to recover damages for personal injuries, to submit to an examination of his or her person by a physician or surgeon appointed or approved by the court, where the injury complained of is latent and not apparent, either as to its nature or as to its extent, and where the plaintiff has declined to submit to such an examination at the request of defendant. This power, however, cannot ordinarily be invoked by the defendant as a matter of right; it is to be exercised by the court in its discretion, and upon due consideration of all the facts and circumstances of each case. The power is denied in some jurisdictions, in the absence of a statute expressly conferring it, and prescribing the conditions under which it may be exercised. It is said that according to the view adopted by the greater number of jurisdictions, it is within the power of the court, in an action for damages for personal injuries, to require the injured person to submit to a physical examination for the purpose of determining the nature and extent of the injury. 17 C. J., 1052, sec. 357 *et seq.,* and cases cited. The refusal of the trial court to make an order for such examination, upon motion of defendant, is not ordinarily subject to exception, or reviewable on appeal.

In *Fleming v. Holleman,* 190 N. C., 449, where the plaintiff had testified that his leg was injured by the negligence of defendant, and had exhibited his leg to the jury, it was held by this Court that it was error for the trial court to refuse defendant's request that plaintiff be required to submit his leg to an examination by physicians and surgeons chosen by defendant, such examination to be made either before the jury or in a private room. It was said, however, that the right to such examination extended only to the injured member or part of the body, which plaintiff had voluntarily exhibited to the jury.

This Court has not heretofore been called upon to decide whether or not a trial court in this State has the power to require the plaintiff in an action to recover damages for personal injuries, to submit to a physical examination prior to the introduction of evidence by the plaintiff to sustain his allegations with respect to the nature and extent of his injuries. There is no statute in this State conferring such power upon a trial court, but we perceive no valid reason why such court does not have the inherent power, to be exercised in its discretion, with due regard to the rights of both plaintiff and defendant, to require the plaintiff in an action to recover damages for personal injuries, to submit to a physical examination, when the request for such examination is seasonably made, and when the court finds that justice to the defendant requires that such examination be made. Whether or not, in any case, such examination shall be made with the X-ray, is for the court to determine, after due consideration of the grounds of objection, if any, made by the plaintiff. Ordinarily, if an examination of plaintiff's alleged injury by means of an X-ray is desired by defendant, and plaintiff has declined to submit to such examination, defendant should move the court for an order requiring plaintiff to submit to such examination, prior to the term of court at which the action stands for trial, and such motion should be passed upon, and disposed of before the action is called for trial.

In the instant case, there was no error in declining to allow defendant's motion, which was not made until after the jury had been empaneled. Conceding that the court had the power to allow the motion, whether or not it should have been allowed in this case, was within the discretion of the court. The contention that there was an abuse of discretion cannot be sustained. After plaintiff had testified, both as to the nature and extent of her injuries, she offered in evidence the testimony of physicians and surgeons, who had with her consent taken X-ray photographs of her hip, and who exhibited these photographs, without objection from the defendants, to the jury. Defendants did not renew their motion after the introduction of this testimony and the exhibition of these photographs. Physicians and surgeons, offered by defendants as witnesses, were examined with respect to the X-ray photographs made of plaintiff's hip, by her physicians and surgeons.

There was no error in sustaining plaintiff's objection to the question addressed to L. W. Flythe, her husband, as to whether he had advised counsel for plaintiff, Irene Flythe, not to consent to an examination of her hip by physicians and surgeons selected by defendants. If this question had been addressed to Irene Flythe, it would have been competent, and not subject to objection. Her affirmative answer to the question would have been competent as tending to impeach her; however, the action of her husband, with respect to the request of defendants' counsel, did not tend to impeach her. Even if the question was competent, as tending to impeach her husband, as a witness in her behalf, the ruling of the court cannot be held prejudicial error.

The bus, owned and operated by defendant, Eastern Carolina Coach Company, which collided with and injured the automobile owned by plaintiff, L. W. Flythe, and in which plaintiff, Irene Flythe, was riding as a passenger, was covered by a policy of indemnity insurance issued by defendant, American Fidelity and Casualty Company. This policy of insurance was filed with the Corporation Commission of North Carolina prior to the date of the collision. It had been accepted by said commission, as a compliance with its rules and regulations, as authorized by statute. It was stipulated in the policy that said bus should be used by its owner for carrying passengers on State highways in North Carolina, only on a fixed schedule, between fixed termini. At the time of the collision, the Eastern Carolina Coach Company was licensed to operate said bus on a fixed schedule, between Wilmington and Charlotte; however, it was authorized, also, to operate said bus on special trips. At the time of the collision the bus was on a special trip from Raleigh to Davidson College.

The liability of defendant, American Fidelity and Casualty Company, for damages resulting from injuries to person or property, caused by the negligence of its codefendant, Eastern Carolina Coach Company, was restricted by the terms of the policy to damages resulting from injuries caused while the bus was being operated only on a fixed schedule. All the evidence is to the effect that the collision which caused the injuries to the plaintiffs in this action, occurred while the bus was being operated by its owner, not on a fixed schedule, but on a special trip. There was error, therefore, in the refusal of the motion of the defendant, American Fidelity and Casualty Company, for judgment as of nonsuit, at the close of the evidence.

The judgment of the municipal court of the city of High Point that plaintiff recover of defendant, American Fidelity and Casualty Company, the amounts assessed by the jury as their damages, respectively, should have been reversed. There was no error in affirming the judgment of said court that plaintiffs recover of defendant, Eastern Carolina Coach Company, such damages. The judgment rendered by the judge of the Superior Court of Guilford County, upon defendants' appeal, from the judgment of the municipal court, should be modified in accordance with this opinion. As thus modified it is

Affirmed.

G. B. D. PARKER ET AL. v. THE STATE HIGHWAY COMMISSION, THE BOARD OF COMMISSIONERS OF DUPLIN COUNTY ET AL.

(Filed 23 June, 1928.)

1. Highways—State Highway Commission—Taking Over County Roads—Statute Allowing Only County Road Body to Object to Location Constitutional—Vested Rights.

Section 7, ch. 46, Public Laws 1927, giving to the road-governing body of a county alone the right to object to a change in the route of an existing State highway, taken over by the State Highway Commission, with certain provisions as to procedure on appeal, and prohibiting certain persons, corporations, or municipal corporations from maintaining any action in the courts in respect thereto, is constitutional and valid, and does not deprive such persons, etc., of any vested right; and this result is not affected by the fact that the county had advanced money to construct the original road, as allowed by law.

2. Same—Powers of County Road Body.

It is within the discretion of the road-governing body of a county to object or not, to the partial change by the State Highway Commission to the road adopted by it as a part of the State system of public highways under the procedure specified by the statute, and their action is not subject to review in the courts, either with respect to a protest or an appeal to the full board of the State Highway Commissioners from the determination of the special committee appointed to investigate the question and determine it preliminarily.

CLARKSON and BROGDEN, J.J., dissenting.

APPEAL by plaintiffs from judgment of *Harris, J.,* dated 20 January, 1928. Affirmed.

Action to enjoin the defendant, the State Highway Commission, from abandoning part of a State highway, in Duplin County, as heretofore located in compliance with statutory provisions, and for mandamus requiring both defendants to construct said State highway in accordance with the provisions of a certain contract heretofore entered into by and between said defendants.

From judgment sustaining a demurrer to the complaint, filed by each of the defendants, plaintiffs appealed to the Supreme Court.

H. D. Williams and L. A. Beasley for plaintiffs.

Assistant Attorney-General Ross for defendant, State Highway Commission.

Gavin & Boney for defendant, the Board of Commissioners of Duplin County.

CONNOR, J. It appears from the complaint in this action that prior to 28 April, 1925, the defendant, the State Highway Commission, pursuant to the provisions of chapter 2 of the Public Laws of 1921, designated as one of the roads to be taken over by said Highway Commission as part of the State highway system, a certain public road, leading from the town of Kenansville, the county-seat of Duplin County, by way of Hallsville in said county, to the Duplin-Onslow line, and thence by Catherine Lake, in Onslow County, to the town of Jacksonville, the county-seat of said county. The said road was shown on the map posted at the courthouse door in Kenansville, as required by statute, and no protest having been filed, it was thereafter adopted and taken over by said Highway Commission as part of the State highway system. It has since been under the control, supervision and maintenance of the said

Highway Commission as a part of route No. 24 of the State highway system between Kenansville and Jacksonville.

Thereafter, the board of commissioners of Duplin County entered into negotiations with the State Highway Commission, which resulted in a contract, in writing, dated 28 April, 1925, by which the said board of commissioners agreed to advance to the State Highway Commission the sum of $400,000, to be used by said Highway Commission in the construction of certain roads in Duplin County, which had been theretofore designated and taken over by said Highway Commission as parts of the State highway system. One of the said roads to be constructed under said contract is the road leading from Kenansville to the Onslow County line. The State Highway Commission agreed to accept from the board of commissioners of Duplin County the said sum of $400,000, and to expend the same in the construction of the roads described in said contract, "in accordance with locations to be determined upon by the said North Carolina State Highway Commission." This contract has been complied with by the board of commissioners of Duplin County, and the State Highway Commission has expended part of the sum advanced by said board in the construction of said roads. No part, however, of the road leading from Kenansville to the Onslow County line had been constructed prior to 31 May, 1927.

On 31 May, 1927, the State Highway Commission, pursuant to the provisions of chapter 46 of Public Laws of 1927, and in accordance therewith, notified the board of commissioners of Duplin County that said Highway Commission proposed to change, in part, the location of the highway leading from Kenansville to the Onslow County line, so that said highway would depart from the original location at Millers Cross Roads, and would run thence by Beulaville, to the original location of said highway, at or near Fountain's store, thereby abandoning so much of said highway as ran from Millers Cross Roads by Hallsville to Fountain's store. Protest was made by the board of commissioners of Duplin County to this proposed change in the location of said highway. This protest was heard by a committee from the State Highway Commission. It was not sustained. The board of commissioners gave notice of appeal from the decision of the committee to the State Highway Commission. Pending the hearing of said appeal, an agreement was entered into by and between the said board of commissioners, and the said Highway Commission, by the terms of which the said appeal has not been prosecuted. The State Highway Commission is now engaged in the construction of the highway from Kenansville to the Onslow County line, by way of Beulaville, and threatens to abandon that part of said highway which runs from Millers Cross Roads by way of Hallsville to the said Onslow County line.

Plaintiffs, residents of Duplin County, in behalf of themselves and of all other citizens and taxpayers of the State of North Carolina, who may make themselves parties hereto, have brought this action against defendants, the State Highway Commission, and the members of said Commission as individuals, and the board of commissioners of Duplin County, and the members of said board as individuals. They pray that "defendant, State Highway Commission, be restrained and enjoined against the abandonment of that part of State highway No. 24, as originally located on State highway map, between Millers Cross Roads by Hallsville, to the Onslow County line near Fountain's store, and that a mandatory order be issued to all of the defendants, requiring them to construct and hard-surface the said highway No. 24 between Kenansville and the Onslow County line, as provided by law, and under the contract of 28 April, 1923, between defendant Duplin County and the defendant State Highway Commission, for costs and general relief."

The defendants, the State Highway Commission, and the individual members thereof, demurred to the complaint herein, for that, among other grounds for such demurrer, it is expressly provided by section 7 of chapter 46 of the Public Laws of 1927, "that no action shall be maintained in any of the courts of this State against the State Highway Commission to determine the location of any State highways or portion thereof, by any person, corporation, or municipal corporation, other than the road-governing body of the county in which said road is situate, or the county-seat or principal town affected, as in this act defined, by any change, alteration or abandonment." From judgment sustaining the said demurrer, and dismissing the action as to these defendants, plaintiffs appealed to this Court.

Chapter 46 of the Public Laws of 1927 was ratified on 25 February, 1927. It has been in full force and effect since said date. This action was begun on 14 January, 1928. Section 7 of said chapter is, therefore, applicable to this action, and is the law governing the same. Whatever doubts may have been held or expressed prior to the enactment of said statute, as to the right of a citizen or taxpayer to maintain an action against the State Highway Commission, or its members, with respect to the location of a State highway, under the provisions of chapter 2 of the Public Laws of 1921, it is clear that since its enactment, such action cannot be maintained, unless section 7 of said chapter is unconstitutional and void, as contended by plaintiffs. Only the road-governing body of the county in which the highway is located, or the county-seat or principal town affected by the location of said highway, or by a change, alteration or abandonment of the same, can now maintain such action. The contention of plaintiffs that section 7 is unconstitutional and void, is not supported by any authorities cited, or sustained by any principle of law. No citizen or taxpayer, as such, has, or can acquire any vested right in the location of a State highway, which deprives the State Highway Commission of the power, conferred by statute, to change, alter or abandon such location. The principle upon which it has been held that the owner of a lot abutting on a street, where the lot was conveyed with reference to such street, and said street was laid out and opened with reference to the sale of lots abutting thereon, has no application to the decision of the question here presented. There is no error in the judgment sustaining the demurrer of defendants, the State Highway Commission, and the members of said Commission. The General Assembly in pursuance of its policy to vest in the State Highway Commission discretion with respect to the location of State highways, and also with respect to the change, alteration and abandonment of same, subject only to restrictions imposed by statute, has expressly denied plaintiffs the right to maintain this action.

Chapter 46 of the Public Laws of 1927, and all its provisions are valid. The change in the highway from Kenansville to the Onslow County line, resulting in the abandonment of that portion of said highway, as originally located, under the provisions of chapter 2, Public Laws of 1921, from Millers Cross Roads by way of Hallsville to Fountain's store, was made by the State Highway Commission, as authorized by statute, and after full compliance with its provisions. Its action with respect to such location is not reviewable by this Court, upon the appeal of the plaintiffs, citizens and taxpayers of the State and residents of Duplin County from the judgment sustaining the demurrer to the complaint. *Parks v. Commissioners,* 186 N. C., 490.

The defendants, the board of commissioners of Duplin County, and the individual members thereof, demurred to the complaint herein, for that, among other grounds for such demurrer, the said complaint does not state facts sufficient to constitute a cause of action against said defendants. From judgment sustaining the said demurrer, and dismissing the action as to these defendants, plaintiffs appealed to this Court.

It does not appear from the allegations of the complaint that the board of commissioners of Duplin County, or that the members of said board, as individuals, have any power or duty with respect to a change, alteration or abandonment of any portion of a State highway located in Duplin County, proposed to be made by the State Highway Commission, in the exercise of the discretion conferred by statute upon said Commission except to protest against such change, alteration or abandonment. Even when such protest is made, and heard, first by the committee, and then upon appeal by said board from an adverse decision by the committee, by the whole Highway Commission, the decision of the State Highway Commission is final and conclusive.

Whether or not, in the first instance, the board of commissioners, as the road-governing body of the county, shall protest against a change, alteration or abandonment of a road located and maintained by the State Highway Commission, as a part of the State highway system, and then, upon an adverse decision by the committee with respect to such protest, shall appeal to the full commission, are both matters within the discretion of said board. Its action, with respect to a protest, or with respect to an appeal, is not subject to judicial review. The courts are without power to control the said board in the exercise of its discretion by a writ of mandamus. Even if the portion of the said highway from Kenansville to the Onslow County line had been constructed prior to the proposed change in its location, such change could have been made by the State Highway Commission, under statutory authority, with the consent of the said board of commissioners, acting as the road-governing body of Duplin County, section 4, chapter 46, Public Laws 1927.

The board of commissioners of Duplin County had the power, conferred by statute, to enter into the contract dated 28 April, 1925, by which the said board advanced a large sum of money to the State Highway Commission in the construction of State highways located in said county and designated in said contract. *Young v. Highway Commission,* 190 N. C., 52. Under this contract it was agreed that the highways to be constructed should be located by the State Highway Commission. Such location could be made at any time prior to construction. *Johnson v. Commissioners,* 192 N. C., 561.

There is no error in sustaining the demurrer of these defendants upon the ground that no cause of action is set out in the complaint against them. The judgment dismissing the action is

Affirmed.

CLARKSON and BROGDEN, J.J., dissent.

W. M. RAMSEY, ADMINISTRATOR OF EZRA HUGHES, DECEASED, v. CAROLINA-TENNESSEE POWER COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 23 June, 1928.)

1. **Electricity — Duty to Inspect, Repair, etc. — Negligence — Res Ipsa Loquitur.**

Companies manufacturing and transmitting deadly currents of electricity are charged with the duty not only to construct, but to maintain its wires in a condition commensurate with the danger to the public, and having control or management of the plant, the doctrine of *res ipsa loquitur* applies when it is shown that an injury or death has been occasioned that would not have occurred under ordinary conditions, leaving the question of negligence an issue for the jury.

2. Same.

Where a railroad company has permitted an electric transmission power company to maintain one of its transmission poles on the railroad right of way, and has negligently shunted one of its cars so as to cause it to strike the pole and cause the deadly current of electricity from high voltage wires to become short circuited, causing visible signs of danger both at the pole and other places to which the current was thus transmitted, causing the death to an employee of a user of the otherwise harmless current: *Held*, the question of reasonable repair by the power company is one for the jury in the action against both defendants for the wrongful death.

3. Negligence—Proximate Cause—There May Be More Than One Proximate Cause of an Injury.

Where two or more defendants are sued for damages, upon evidence tending to show the concurring negligence of each as the cause of the injury in suit, there may be more than one efficient proximate cause of the injury.

4. Negligence—Actions—Evidence—Damages.

The measure of damages to be awarded in a negligent personal injury case is exclusively for the jury, and evidence of the amount of an attempted compromise is properly excluded.

5. Jury—Challenges—Number and Parties Entitled.

When two defendants are sued for damages in negligently causing a death, the decision of the trial judge is final as to the interest of each defendant and the number of challenges to the jury allowable to each. C. S., 2331, 2332.

APPEAL by defendants from *Deal, J.*, at January Term, 1928, of CHEROKEE.

Action for personal injury resulting in death. As to the Murphy Steam Laundry the action was dismissed as in case of nonsuit. On behalf of the plaintiff there was allegation with proof that the Carolina-Tennessee Power Company was and now is a corporation engaged in the business of producing and transmitting by means of wires, transformers, etc., and selling to its customers, one of whom was the Murphy Steam Laundry, electric currents and electric energy for domestic, industrial, and other uses; that the L. & N. Railroad Company was and now is a corporation operating a railroad as a common carrier of passengers and freight between Murphy, North Carolina, and Blue Ridge, Georgia; that prior to 19 April, 1927, the Power Company, with the knowledge and consent of the Railroad Company, had erected and was then maintaining one of its poles (to which were affixed transformers and wires of high voltage) within a few feet of the end of a spur track over which the Railroad Company switched and moved its cars; that there was no bumper, embankment, or other device to prevent cars from running off the track; that the pole was on the right of way of the Railroad Company, as was also the anchor to which the guy or cable was fastened; that the guy extended from the anchor to the pole and was directly over the right of way; that both defendants were negligent in that one erected the post and put up the guy on the right of way and the other permitted its right of way to be used for this purpose; that on 18 April, 1927, the Railroad Company negligently shunted cars on the spur track so as to cause one of them to run off the rails at the end of the track and to strike the guy with great force, thereby injuring the transformers on the pole, and other electrical appliances, and causing the electric current transmitted on the high voltage wires to flow along the wire leading to the plant of the steam laundry; that among other machines the laundry company used washers which were operated by electricity and which were connected with and disconnected from the power line by the insertion or removal of a plug; that on 19 April, 1927, the plaintiff's intestate in doing the work assigned him as an employee of the laundry company suffered an electric shock of such intensity as to cause his instant death, and that the negligence of both defendants was the proximate cause thereof.

Separate answers were filed and each defendant denied the material allegations of the complaint and pleaded contributory negligence on the part of the intestate. All the issues were answered in favor of the plaintiff and damages were assessed. From the judgment rendered the defendants appealed, assigning error, which is set out in the opinion.

Bryson & Bryson and J. D. Mallonee for plaintiff.
R. L. Phillips for Carolina-Tennessee Power Company.
M. W. Bell for Louisville and Nashville Railroad Company.

ADAMS, J. Since both the Power Company and the Railroad Company moved in compliance with the statute for judgment of nonsuit, it becomes necessary to examine the evidence in its relation to the alleged negligence of each defendant. One of the contentions of the plaintiff is this: that the Power Company was negligent in putting up its post and its guy on or near the roadbed of the Railroad Company, and that the latter company was negligent in permitting them to be put there. While there is some evidence in support of this contention there are other circumstances which in our opinion justify a denial of the motion. There was evidence that the intestate's death occurred in this way: Two washers were outside the laundry; one was connected by means of a cord or cable to a three-way socket midway between the washer and the laundry building where there was a switch or little button; connected with this was a cord or "green twisted wire" which extended through the window of the laundry and "was pushed into a plug." The deceased was in charge of the washing machine; he had gone into the house and had returned when a colored woman told him the motor was smoking. He took hold of the switch with his right hand, said "Lord, have mercy," quivered, shook, caught the wire with his left hand, "crumpled up against the washing machine," and instantly died. These circumstances, if accepted by the jury, were sufficient to make a case of prima facie negligence against the Power Company, subject of course to any explanation it should make, or in the absence of explanation to the hazard of an adverse verdict. *Houston v. Traction Co.,* 155 N. C., 4; *Shaw v. Public-Service Corporation,* 168 N. C., 611; *Cochran v. Mills Co.,* 169 N. C., 57. It has often been said that when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have control of it use the proper care, it furnishes evidence that the accident arose from want of such care; but the application of the maxim extends no further than to require the case to be submitted to the jury. *Shaw v. Public-Service Corporation, supra; Ridge v. R. R.,* 167 N. C., 510.

The Power Company says that the maxim, *res ipsa loquitur,* never applies where the cause of the accident is known, and that the verdict establishes the negligence of the Railroad Company as the proximate cause of the injury and death. An answer is given in *Electric Co. v. Letson,* 68 C. C. A., 453, quoted in *Houston v. Traction Co., supra:* "The contention of the company amounts to this: that if the wires were properly installed it cannot be held responsible for their being out of repair, unless it is proved that they got out of repair through its own fault. But this loses sight of the duty of the company not only to make the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and the public permits no intermission. Constant oversight and repair are required and must be furnished." The company was required on its own responsibility to make reasonable inspection, and what is reasonable inspection is generally a question for the jury.

That there is evidence of negligence on the part of the Railroad Company in "shunting" or "kicking" its cars needs no citation of authority; the contested question is whether such negligence proximately caused or concurred in causing the intestate's death. On this point there was evidence tending to show that when the derailed car struck the guy or cable the post was jarred and "looked like it might fall"; that a little blaze ran up a few minutes about the second cross-arm on the pole, on which two loose wires were hanging; that a noise like "spitting" or "a racket something like frying" was heard; that the blaze was evidence of an arc, that is, electricity passing from one wire to another; that if wires of high and low voltage crossed and there was an arc between them an electric current could pass from the wire of high voltage to the one of low voltage; that the flame was probably caused by a short circuit; that if there is no atmospheric disturbance there will be no flame "if everything is functioning properly"; and that if a "frying sound was heard there was something wrong." There was evidence that the cable was struck about 2 or 3 o'clock on the afternoon of 18 April, and that soon thereafter electrical disturbance was noticed in a garage, a hardware store, and on a clothes line, each separate wire communicating with the transformer on the pole. Proof of these circumstances was competent in corroboration of the plaintiff's contention.

The evidence precluded dismissal of the action. In a motion to nonsuit, the plaintiff must be given the advantage of every inference that may reasonably be drawn from the testimony of the witnesses; and the testimony thus considered is susceptible of the construction that the intestate's death was proximately caused by the concurring negligence of the defendants. The motion for nonsuit was therefore properly denied.

The exception to the court's apportionment of challenges is addressed to the exercise of discretion which has not been abused, if it be admitted that the interests of the defendants are antagonistic. Moreover, the decision of the judge as to the nature of the interests and the number of challenges is final. C. S., 2331, 2332.

The facts assumed in the hypothetical question which is the subject of the tenth exception are sufficiently supported by the evidence to overcome the appellants' objection to its admission; and as to the twelfth, we do not see that the record of a compromised suit between the plaintiff and some of the next of kin of the deceased is competent as bearing upon the question of damages, the only purpose for which it was offered. The measure of damages as a legal question could not be affected or modified by the estimate set by the plaintiff or any other person as a just compensation for the pecuniary injury resulting from the intestate's death. This was a matter exclusively for the jury. The remaining exceptions to the admission of evidence present no question which calls for discussion.

Exception was taken to the instruction that there may be more than one proximate cause; but in the law of negligence no rule is better settled than this: there may be more than one efficient proximate cause of an injury. 21 A. & E. (2 ed.), 495; *Harton v. Telephone Co.,* 141 N. C., 455, 461; *Bagwell v. R. R.,* 167 N. C., 611, 616; *White v. Realty Co.,* 182 N. C., 536; *Mangum v. R. R.,* 188 N. C., 689.

We have given to each of the other exceptions our careful attention, and are of opinion that the record presents no error entitling the defendants, or either of them, to a new trial.

We are aware of the uncertainty with which, the defendants say, their evidence has clothed the circumstances of the intestate's death, including the time that elapsed between the alleged damage to the transformer and the injury to the deceased; but unless reversible error in law was committed, it is not our province to interfere with the verdict or judgment and to award the defendants another hearing. We find the record, presenting the exceptions of both defendants, to be free from error.

No error.

J. C. LITTLE ET AL. v. BOARD OF ADJUSTMENT OF CITY OF RALEIGH.

(Filed 23 June, 1928.)

Judgments—Conclusiveness of Adjudication—Matters Concluded—Res Adjudicatur.

The city board of adjustment, on appeal from the action of the building inspector as to issuing a permit to erect a gasoline filling station in a certain part of the city, determines the matter upon the facts presented in a *quasi*-judicial capacity, and the doctrine of *res adjudicatur* applies upon a subsequent presentation to them of the issuing of the permit upon the same lot under substantially the same conditions.

CIVIL ACTION, before *Sinclair, J.,* at December Term, 1927, of WAKE.

This cause was considered in *Harden v. Raleigh,* 192 N. C., 395, 131 S. E., 760, where the facts are set forth. After said decision was rendered by the Supreme Court on 27 October, 1926, the owner of the lot applied to the defendant Mangum, building inspector, to reopen and rehear the former decision, denying a permit for erecting a filling station upon the land described. The building inspector thereupon issued a permit for said filling station and the plaintiffs appealed to the board of adjustment. The board of adjustment was duly convened to hear the matter and at the said meeting the plaintiffs appeared and contended that the former ruling of the board of adjustment referred to in *Harden v. Raleigh, supra,* was *res judicata* as there was neither allegation nor proof that conditions had changed since said decision by the Supreme Court. On 30 September, 1927, the board of adjustment voted upon the question of sustaining the building inspector in issuing the permit, and said record disclosed that two members of the board were in favor of sustaining the building inspector and two members voted not to sustain said building inspector in issuing said permit. Thereupon the plaintiffs filed a petition for a writ of *certiorari.* The cause came on to be heard before *Sinclair, J.,* who found as follows: "The court further finds as a fact that after the Supreme Court had passed upon two questions of law presented to it, and had sustained the validity of the ordinances and overruled the judgment of Judge Barnhill, the said Mrs. George M. Harden duly applied to the building inspector of the city of Raleigh to reopen and rehear its former decision upon the building of the filling station upon her said lot, and duly filed with the said building inspector, with her application, plans and specifications as required by the ordinances of the city of Raleigh; that the building inspector, after hearing the evidence and argument on behalf of the plaintiffs and defendants . . . reversed his former ruling and granted to the said Mrs. George M. Harden a permit to build said filling station in such neighborhood business district. . . . That from the decision of the said building inspector the plaintiffs duly appealed to the board of adjustment, and after a full hearing before said board of adjustment, that the said board of adjustment sustained the action of said building inspector, and ordered that the permit issue to the said Mrs. George M. Harden to build the filling station on her lot as prayed. . . . It is further ordered, adjudged and decreed that the said Mrs. George M. Harden is entitled to construct upon her said lot a filling station in accordance with the plans and specifications filed with the said building inspector of the city of Raleigh, and the permit granted to her. It is further ordered by the court that the motion of defendants for judgment on the pleadings as filed herein, be and the same is in all respects sustained, and that the plaintiffs pay the costs of this action, to be taxed by the clerk."

From the foregoing judgment the plaintiffs appealed upon the ground that the trial judge did not hold as a matter of law that the former judgment of the board of adjustment in *Harden v. Raleigh* was an estoppel or *res judicata.*

Attorney-General Brummitt and Assistant Attorney-General Nash for plaintiffs.

W. B. Jones and C. W. Beckwith for defendant.

BROGDEN, J. The case of *Harden v. Raleigh,* 192 N. C., 395, determined two questions.

1. That the board of adjustment is clothed with at least *quasi*-judicial power and that the investigation of facts as a basis of official action is

not a ministerial duty, the Court saying, "but the exercise of judgment or discretion may be regarded as the usual test by which to determine whether an act is ministerial or judicial. Within the class of *quasi*-judicial acts fall the board's conclusions as to whether the proposed building would be noxious or offensive or detrimental to the public safety or welfare by reason of its situation or the surrounding conditions; also in this class is the legal discretion to be exercised by the board upon the conclusions reached."

2. That the record did not disclose that the board of adjustment in declining the permit had improperly exercised its discretion.

From the finding of fact made by the trial judge in the case at bar it therefore appears that practically the same parties are contesting the same matter and in the same manner as in the case of *Harden v. Raleigh, supra.* Moreover the controversy is based upon the same facts and allegations contained in the former case. The petitioners appeared before the board, in the case at bar, and filed a plea of *res judicata* contending that the case of *Harden v. Raleigh, supra,* had determined the rights of the parties upon the same facts. While the plea of *res judicata* is not available with respect to proceedings by a purely administrative board, it is available with respect to the proceedings and final decision of a judicial or *quasi*-judicial body. *In re Smiling,* 193 N. C., 448. There is no allegation, no proof, and no finding by the trial court that the facts in the case at bar are in anywise different from the facts in the case of *Harden v. Raleigh.* Indeed, the trial judge finds that Mrs. Harden applied to the building inspector "to reopen and rehear its former decision upon the building of the filling station upon her said lot."

Upon these circumstances we are constrained to hold that the plea of *res judicata,* duly filed in apt time by the petitioners, was available, and therefore that the owner of the lot is not entitled to reopen and rehear the case upon the identical facts presented in the former record.

Reversed.

DAVIS OGLE v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 23 June, 1928.)

1. **Master and Servant—Liability of Master for Injuries to Servant—Assumption of Risk.**

Where an employee acts, under fear of discharge, upon the negligent order of the employer's vice-principal, which results in the personal injury in suit, under circumstances showing that a man of ordinary prudence would have so acted, the doctrine of assumption of risk has no application.

2. Appeal and Error — Record — Review of Question Not Presented on Record.

The charge of the court to the jury will be presumed as correct on appeal when it is not set out in the record.

APPEAL by defendant from *Moore, J.,* at October Term, 1927, of YANCEY. No error.

The evidence tended to show that plaintiff was a section hand on defendant's railroad and was under the direction of the foreman, or vice-principal, of said defendant, Mr. Jarrett, whom he was bound to obey. That defendant's track had sagged or sunk down, and it became necessary to level it. A jack, weighing about 40 or 45 pounds, was used to elevate the track. The usual and ordinary way to get the jack out from under the ties was to "trip it." "I mean by tripping it, I would have to walk it off by latches. It would go down when you tripped it about an inch each time, and when you walked it off it would go down the same way." There was no danger in doing it this way. When the jack was placed under the tie and it was jacked up, the foreman walked down the track a rail or more and got down to sight the rail and had plaintiff to run the jack up and down until the foreman obtained the level he wanted. He then ordered plaintiff to prize the jack off and *let it fall or settle.*

Plaintiff testified: "I prized it off. But it was hard to prize with so much weight on the jack, the jack being ten inches off of the ties, so I made four or five tries before I got it off, and I got myself in the clear as near as I could with me between the rail and the jack. I gave five or six hard pulls and the jack bounced back and struck me on the leg. . . . If I hadn't done what he told me he would have told me I needn't come out next morning. That was the reason I did it. When the jack hit me it pulled down the skin of my leg and bruised me and my flesh was in a tremble, something like that, and I was hurting very bad. When the jack jumped out against my leg, I done the best I could to protect myself; I jumped out as far in the clear as I could, and when Mr. Jarrett said to prize it off I wanted to do according to his order."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover of the defendant, Black Mountain Railway Company? Answer: $2,500."

G. D. Bailey and A. Hall Johnston for plaintiff.
J. J. McLaughlin, Charles Hutchins and Pless & Pless for defendant.

CLARKSON, J. The defendant introduced no evidence, and at the close of plaintiff's evidence moved for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion, and in this we think there is no error.

In *Hamilton v. Lumber Co.,* 156 N. C., at p. 523-4, *Hoke, J.,* clearly states the law as follows: "It is well understood, however, that an employer of labor may be held responsible for directions given or methods established, of the kind indicated, by reason of which an employee is injured, as in *Noble v. Lumber Co.,* 151 N. C., 76; *Shaw v. Mfg. Co.,* 146 N. C., 235; *Jones v. Warehouse Co.,* 138 N. C., 546, and, where such negligence is established, it is further held, in this jurisdiction, that the doctrine of assumption of risk, in its technical acceptation, is no longer applicable (*Norris v. Cotton Mills,* 154 N. C., 475; *Tanner v. Lumber Co.,* 140 N. C., 475), but the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should quit the employment rather than incur them. *Bissell v. Lumber Co.,* 152 N. C., 123; and, on the issues, as to plaintiff's conduct, the fact that the particular service was rendered with the knowledge and approval of the employer or his vice-principal or under his express directions, if given; also, the employee's reasonable apprehensions of discharge in case of disobedience, etc., may be circumstances relevant to the inquiry. *Hicks v. Mfg. Co.,* 138 N. C., 322."

Walker, J., in *Tate v. Mirror Co.,* 165 N. C., at p. 279, lays down the rule in human terms, as follows: "The law applies the golden rule, that the master must do for the servant what, if placed in the same situation and under the same circumstances, he would do for himself. There is no reason of logic or justice which requires that he should do less. This rule has been applied by us to causes here with great frequency and uniformity. We have not departed in the least from its essential principle in a single case that we are aware of. It is perfectly just to the employer and is required by a proper sense of fairness to the employee. It is the abstract maxim which we are constantly told should govern our conduct towards our fellow-man in everyday affairs of life, and it is so commendable in itself as to call for a strict observance of it when we come to the practical discharge of our duties to others, especially those in subordinate positions, and who must depend for their safety upon the care of their superiors. . . . We said in *Pigford v. R. R.,* 160 N. C., at pp. 100 and 101: *"It is well understood, however, that an em-*

ployer of labor may be held responsible for directions given or methods established of the kind indicated, by reason of which an employee is injured." (Italics ours.)

The charge of the court below is not in the record; it is presumed that the law applicable to the facts were properly presented to the jury. We can find

No error.

CENTRAL BANK AND TRUST COMPANY v. E. C. JARRETT AND CHARLES G. LEE, RECEIVER OF E. C. JARRETT.

(Filed 23 June, 1928.)

Receivers—Payment of Claims—Secured Creditor May Resort Primarily to General Fund.

Where a bank has secured a deed of trust on lands from its customer as a basis for a line of credit, upon the insolvency and receivership of the customer, the bank may primarily resort to its proportionate part of the assets, available to general creditors in the receiver's hands, before proceeding to realize upon its mortgage security.

CIVIL ACTION, before *Moore, J.*, at January Term, 1928, of BUNCOMBE.

Merrimon, Adams & Adams and Mark W. Brown for plaintiff.
Joseph F. Ford and S. G. Bernard for defendant.

BROGDEN, J. The question of law is this: In the event of insolvency and the appointment of a receiver for a debtor, has a secured creditor the right to resort primarily to the general fund for the payment of his debt?

The defendant, E. C. Jarrett, was engaged in the grocery business in Asheville. He applied to the plaintiff bank for a line of credit in the sum of $19,450. Plaintiff agreed to advance said sum provided Jarrett and his wife would execute as security therefor a deed of trust upon certain real estate. Thereupon the plaintiff advanced to Jarrett the sum of $19,450, evidenced by notes made or endorsed by Jarrett, all of said notes being secured by deed of trust executed by Jarrett and wife. In 1927 Jarrett made an assignment for the benefit of his creditors. Thereafter a receiver was duly appointed by the court and the said receiver took charge of the assets and property of said debtor. There are now in the hands of the receiver certain funds derived from the sale of Jarrett's property, other than the land embraced in said deed of trust. The real estate described in the deed of trust is amply sufficient to pay the amount due plaintiff bank.

The general creditors of Jarrett contend that the plaintiff bank must first exhaust the security it has by virtue of said deed of trust before it can participate in the general fund. Mrs. Jarrett contends that the plaintiff bank must first prove its claim against the general fund in the hands of the receiver and resort to the security only in the event the general fund is not sufficient to pay the claim of $19,450.

The trial judge, upon motion for judgment upon the pleadings, ruled that the plaintiff was entitled to share pro rata in the general fund in the hands of the receiver to the full amount of the claim held by it before resorting to the security. The judgment so rendered was a correct interpretation of the law upon the facts disclosed by the record. *Winston v. Biggs,* 117 N. C., 206, 23 S. E., 316; *Bank v. Flippen,* 158 N. C., 335, 74 S. E., 2; *Milling Co. v. Stevenson,* 161 N. C., 513, 77 S. E., 762.

There are other interesting questions discussed in the briefs, but they are not pertinent to a decision of the question presented by the pleadings and the judgment.

Affirmed.

NORTH CAROLINA HIGHWAY COMMISSION v. R. G. RAND AND FIDELITY AND DEPOSIT COMPANY, OF MARYLAND.

(Filed 23 June, 1928.)

1. **Highways—State Highway Commission—Construction of Contracts for Construction of Road.**

A contract made with the State Highway Commission for the building of a certain length of designated highway, for a certain sum, payable in monthly installments, within a time limit, with certain provisions for extension of time under certain conditions, and giving the Commission, through the State Engineer, the power to annul the contract under conditions showing that the work as then prosecuted would not be completed within the time limit, is an indivisible contract, giving the contractor the right to complete his contract after he has partially done so, and except by complying with the statutory provisions as to giving him notice of the unsatisfactory progress of the work by the State Engineer, upon the conditions imposed, the contractor is entitled to recover upon a counterclaim, in the suit of the Commission, the profits he would have made upon the work left incompleted, upon the giving of the work to another contractor.

2. **Same—Termination of Contract.**

Where the right to terminate a contract for the construction of a State highway, made with the State Highway Commission, is given to the State Engineer, it must be exercised by him in accordance with the terms of the contract, and not by a subordinate engineer.

3. Principal and Surety—Liability of Surety.

In determining the question of the liability of the surety on the bond of a contractor with the State Highway Commission for default of the contractor in building a State highway in accordance with his contract, the contract will be interpreted in the light favorable to the surety when a doubt as to its meaning reasonably arises from the language used.

4. Contracts—Construction—Entire and Divisible Contracts—Questions of Law.

Where a contract is expressed in clear terms, its construction is a matter of law as to whether it is entire or divisible.

APPEAL by defendants from *Harding, J.*, at September Term, 1927, of HAYWOOD. New trial.

This was a civil action brought by the plaintiff, the State Highway Commission, against R. G. Rand and Fidelity and Deposit Company of Maryland, for the recovery of the sum of $63,510.50 for alleged breach of the contract sued on.

On 27 July, 1923, the plaintiff and the defendant, R. G. Rand, entered into a contract for the construction of a certain road leading from Waynesville, N. C., to Pigeon River, in Haywood County, known as State Highway Project No. 940, "being approximately 7.13 miles long and approximately estimated to cost $80,380.00." Prior to this time the plaintiff had contracted the construction of this same road to Alexander & Patton, and the contract between the plaintiff and the defendant Rand referred to the Alexander & Patton contract and made certain of its provisions parts of the contract sued on. Following the execution of the contract sued on, to wit, on 28 July, 1923, the defendant Rand entered into an indemnity or guaranty bond in the sum of $40,000 with the defendant, Fidelity and Deposit Company of Maryland as its surety, with the usual conditions, and the Surety Company was made a party defendant for the purpose of making it liable for the alleged breach of the contract with Rand. The defendants denied any breach of the contract on the part of Rand, alleging that the plaintiff breached the contract by placing, without defendants' consent, and without giving the notices required by the contract, men and equipment in charge of one end of the road, thereby rendering it impossible for the defendant Rand to perform and complete the contract on his part. For this alleged breach of the contract on the part of the plaintiff, the defendant Rand pleaded a counterclaim and sought recovery of the plaintiff for $20,722 damages.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the defendant, R. G. Rand, commit a breach of his contract with the plaintiff, executed 27 July, 1923, as alleged in the complaint? Answer: Yes.

"2. Did the defendant, Fidelity and Deposit Company of Maryland, commit a breach of its indemnity bond, executed for its codefendant, R. G. Rand, on 27 July, 1923, as alleged in the complaint? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover of the defendants by reason of such breach? Answer: $24,222, with interest from 12 July, 1924.

"4. Did the plaintiff commit a breach of its contract with the defendant, R. G. Rand, executed 27 July, 1923, as alleged in the answer? Answer: No.

"5. Did the plaintiff commit a breach of its contract with the defendant, Fidelity and Deposit Company of Maryland, as alleged in the answer? Answer: No.

"6. What damages, if any, is the defendant, R. G. Rand, entitled to recover of the plaintiff by reason of his counterclaim? Answer: Nothing."

DEFINITION OF TERMS

"Engineer"—The State Highway Engineer of the State of North Carolina, duly authorized by the State Highway Commission, acting either directly or through authorized assistants, by whom all explanations and directions necessary for the satisfactory prosecution and completion of the work will be given.

Quantities Are Approximate Only. The foregoing quantities are approximate only, being given as a factor for the computation of the total amount of bids, upon which basis such bids are to be computed. The State Highway Commission does not expressly or by implication agree that the actual amount of work and materials will correspond therewith, and reserves the right to increase or decrease the amount of any class or portion of the work and materials as may be deemed necessary or expedient by the engineer.

Examination of Plans, Site, etc. Before submitting a proposal, each bidder should make a careful examination of the attached conditions, specifications and contract, and fully inform himself as to the quality of materials and character of work required, and should further make a careful examination of the source of supply for materials; and should his proposal be accepted, he will be responsible for each and every error in his proposal resulting from his failure or neglect to observe or comply with these instructions.

Additional Work. The contractor shall perform such work, in additional quantities other than those designated in the approximate estimate, as may be deemed necessary to complete fully the roadway as planned and contemplated, and shall receive for such additional work payment in full at the prices shown on the contract and in the same manner as if such work had been included in the original estimate of quantities.

Progress of Work. The contractor shall within ten (10) days after the award of contract begin and promptly and efficiently prosecute the work with a force adequate to complete the project for which he has contracted within the time fixed therein for completion. Failure to comply with this requirement may result in the annulment of the contract as hereinafter provided.

Character of Workmen and Equipment. The contractor shall at all times employ sufficient labor and equipment for prosecuting the several classes of work to full completion in the manner and time specified. Any person employed by the contractor whom the engineer may deem incompetent or unfit to perform the work shall be at once discharged; such persons shall not be employed again on any work which is under the jurisdiction of the State Highway Commission. Failure by the contractor to provide adequate equipment may result in the annulment of the contract as hereinafter provided.

Engineer's Decision Final. It is mutually agreed between the parties to the contract that to prevent all disputes and misunderstandings between them in relation to any of the provisions contained in these specifications, or their performance by either of said parties, the engineer shall be a referee to decide all matters arising or growing out of said contract between them, and his decisions shall be final and binding upon both parties.

Time of Completion. In computing the time allowance for completing the work, the engineer will allow an additional number of working days over and above the time allowance mentioned in the proposal equal to the number of working days lost by the contractor after starting the work, because of conditions which the engineer considers such as to prevent the work, and during which days work was actually suspended or materially impeded. The basis for computing any extra time allowance will be the weather record kept by the engineer or his assistants. If the satisfactory execution and completion of the contract shall require work or material in greater amounts or quantities than those set forth in the contract, the contract time shall be increased in the same proportion as the additional work bears to the original work contracted for. No allowance shall be made for delay or suspension of the prosecution of the work due to fault of the contractor.

Failure to Complete Work on Time. Should the contractor fail to complete the work within the time allowance mentioned in the proposal subject to the above modifications, the engineer will thereafter deduct from any moneys due or becoming due to the contractor an amount equal to the cost of maintaining the necessary force of engineers and inspectors during the additional time, together with an additional sum of 10% per annum of the cost of the construction, incomplete at the expiration of the time limit given in the contract, for the additional time required, and this amount shall be considered as reasonable liquidated damages due the State Highway Commission by the contractor for his failure to have finished the work within the specified time limits.

(68) *Annulment of Contract.* The contract, of which these specifications form a part, may be annulled by the State Highway Engineer for the following reasons: (1) Substantial evidence that the progress being made by the contractor is insufficient to complete the work within the specified time. (2) Failure on the part of the contractor to observe the requirements of these specifications. (3) Failure on the part of the contractor to properly make good any defects in materials or workmanship that may be pointed out to him by the engineer.

Before the contract is annulled the contractor and his surety will first be notified in writing by the State Highway Engineer of the conditions which make annulment of the contract imminent. Fifteen days after this notice is given, if no effective effort has been made by the contractor or his surety to correct the condition complained of, the State Highway Engineer may declare the contract annulled, and notify the contractor accordingly.

Upon receipt of a notice from the State Highway Engineer that the contract has been annulled, the contractor shall immediately discontinue all operations. The State Highway Engineer may then proceed with the work in any lawful manner that he may elect, until it is finally completed. When the work is thus finally completed, the total cost of the same will be computed. If this total cost is less than the contract price, the difference will be paid to the contractor. If the total is greater than the contract price, the difference shall be made up either by the contractor or his surety.

Mr. C. M. Upham was State Engineer at the time this controversy arose. Mr. J. C. Walker, the District Engineer for the Ninth District, where the project in question was located, made arrangements with Mr. Dicus and Wardrep about going on the work. From the whole record, it appears undisputed that Mr. Upham, the Highway Engineer, did not write a letter, issue a notice or give instructions to Mr. Walker or in any way sanction the acts or conduct of Walker or the Highway Commission in taking over the contract of the defendant Rand and making its performance by him impossible.

There were sixty-four assignments of error in addenda to record; two are withdrawn.

The other necessary facts and the material assignments of error will be considered in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Ross for the plaintiff.

J. W. Haynes and Morgan & Ward for defendant, R. G. Rand.

Felix Alley, J. Harry Schisler and S. Brown Shepherd for The Fidelity and Deposit Company of Maryland.

CLARKSON, J. The contract between plaintiff and defendant, R. G. Rand, was to the effect that he was to *complete* project No. 940, approximately 7.13 miles, at the cost of approximately $80,380 of "gravel two-course," a graded road with a surface of two courses of crushed stone, from Waynesville, N. C., to Pigeon River in Haywood County, N. C. Rand's outfit was put on the Woodrow end of the job. The Commission to make monthly and final payments, unit prices. Other minor provisions not necessary to be considered. It was in evidence that the value of the equipment which R. G. Rand had furnished on the job, was between $12,000 and $15,000. The construction of a contract, it is well settled, is a matter of law, and the meaning of the terms, if precise and explicit, is a question for the court. We think the contract entire, indivisible and not severable.

In Page on The Law of Contracts, part section 2083, p. 3606, it is said: "If a contract contains two or more covenants on either side, the question arises as to whether it is entire or severable. An entire contract is one the covenants of which have not been separated by the parties, and which accordingly cannot be separated by the court. It is also said to be a contract in which the parties intend that each covenant shall be connected with and related to every other covenant. It is also said to be a contract which is intended to accomplish a single object." And again, part section 2088, at p. 3615-16: "A contract to furnish services at a certain price per unit, or to furnish goods at a certain price per unit, or to lease property at a certain amount per time unit, have each been held to be entire. The fact that separate items are entered for work and material in a contract for constructing or repairing an article, does not show that such contract is severable, if such items are inserted so as to show the adversary party how the total consideration was reached. The fact that provision is made for payment in installments does not of itself tend to show that the contract is severable, unless each installment is apportioned by the parties to a certain portion of the performance. A contract to work for a certain period of time at a specified salary is entire, although the salary is payable monthly." *White v. Brown & Son,* 47 N. C., 403; *Dula v. Cowles, ibid.,* p. 454; *Thigpen v. Leigh,* 93 N. C., 47; *Tussey v. Owen,* 139 N. C., 457; *Grocery Co. v. Bag Co.,* 142 N. C., 174; *Steamboat Co. v. Transportation Co.,* 166 N. C., 582; *McCurry v. Purgason,* 170 N. C., 463; *Hayman v. Davis,* 182 N. C., 563; *Smith v. Smith,* 190 N. C., 764.

In *Wooten v. Walters,* 110 N. C., at p. 254, it is said: "A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions and consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety and the purchaser will be liable for the entire sum agreed to be paid. And so also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. Hence, it has been held that where a cow and four pounds of hay are sold for seventeen dollars the contract was entire. *Mr. Justice Story* says that 'the principle upon which this rule is founded seems to be that as the contract is founded upon a consideration upon the entire performance thereof, if for any cause it be not wholly performed the *casus foederis* does not arise, and the law will not make provision for exigencies against which the parties have neglected to fortify themselves.' Such contracts are enforceable only as a whole." McIntosh, Cases on Contracts, 609.

In *Edwards v. Proctor,* 173 N. C., at p. 43, it is said: "When parties enter into a contract for the performance of some act in the future, they impliedly promise that, in the meantime, neither will do anything to the harm or prejudice of the other inconsistent with the contractual relation they have assumed. The promisee, it also has been said (and this seems so to the better reason), has an inchoate right to the performance of the bargain, which becomes complete when the time for such performance has arrived, and, meanwhile, he has a right to have the contract kept open as a subsisting and effective one, as its unimpaired and unimpeached efficacy may be essential to his interests. Clark on Contracts (1904), p. 445, 447; *Frost v. Knight,* L. R., 7 Exch., 111."

The general rule is that rescission will not be permitted for casual, slight or incidental breach of the contract, but only for such breaches as are material or substantial. It goes without saying that this depends largely on the terms and purposes of the contract and the circumstances surrounding the reason for the rescission. 9 C. J., Building and Constructing Contracts, sec. 60, p. 724-5; 13 C. J., Contracts, sec. 661, p. 613; *Moss v. Knitting Mills,* 190 N. C., 644.

In the present action, the evidence on the part of plaintiff tended to show that about two weeks after the contract was signed, defendant, R. G. Rand, started setting up equipment. The equipment was not sufficient to complete the work in 150 days, the trucks were five-ton and too heavy. There were not enough men to operate the gravel-crushing plant nor teams and drivers to engage in common excavating. That he was urged to increase his force frequently by plaintiffs' resident engineer and the district engineer and to hurry up the work. That 75 of his working days had been consumed and approximately 15 to 20 per cent of the work covered by his contract had been performed. Plaintiffs' witness, George P. Holland, testified: "Mr. Rand built two miles of project 940." On cross-examination he said: "I think Wardrep went on the job about 10 November; he was also on a basis of costs of everything plus ten per cent. He worked three or four weeks, furnished teams and crew to do the rough grading ahead of Mr. Dicus, who was doing fine grading and surfacing on the Waynesville end of the job. Both Dicus and Wardrep had been put on the job by the State Highway Commission. At the time they were put on Mr. Ordway was in charge of Mr. Rand's crew, and Mr. Rand's crew was on the project at work, grading, getting out gravel and excavating under the terms of the contract. After these two men were placed on the Rand contract I think Mr. Rand continued to operate there six weeks."

On the other hand, the evidence on the part of R. G. Rand tended to show that he put $12,000 to $15,000 of equipment on the job; that he had made as great progress as any contractor could under the circumstances. He had put down something over two miles of the base course and completed one-half of the grading for the entire contract.

The State Highway Commission put Mr. Wardrep on the west end of the project on about 10 November, 1923, and Mr. Dicus on about 16 November, 1923. They were some three or four miles from where Rand's forces were at work. They placed a large force on that end. Rand was working on the east end of the project. Rand protested to the chairman of the plaintiff Commission, in letter 23 November, 1923: "My position, therefore, under my contract, is that this is an unwarranted interference." A copy of this letter was sent to defendant, Fidelity and Deposit Company of Maryland. In letter dated 17 December, 1923, to chairman State Highway Commission, he states: "I am in receipt of your letter of 27 November, 1923, and have taken a few days to reply, in order to give the matter careful consideration. My conclusion is as stated in my former correspondence to you that I have a valid contract for doing this work, and that I am making a legitimate profit under this contract and making fair progress under all the circumstances, and, if not interfered with, would continue to make a fair progress and would complete the work under the provisions of the contract."

In letter of .... January, 1924, to chairman State Highway Commission, he says: "I am in receipt of your letter of 2 January, in which you state that I have abandoned project 940, Haywood County, and that it has become necessary for you to cancel the contract, with the further statement that you are notifying the Fidelity and Deposit Company of Baltimore as to your action. This, you state, is in reply to my letter of 17 December. You have a statement of my position with reference to this contract in my letter of 17 December. I have done nothing upon which you could base the inference, much less infer that I had abandoned my contract. On the contrary, I have not abandoned this contract, but I do say that in placing another contractor on this project you were guilty of a breach of this contract, and I so notified you." Copy of this letter was sent to Fidelity and Deposit Company of Maryland.

R. G. Rand testified: "At this time I had plenty of equipment and I was ready and willing to complete the work." It was in evidence that he had about 45 men on the job. It was contended by defendants that the project was completed in the time limit under the terms of the contract of Mr. Wardrep and Mr. Dicus, contractors put on the west end of the job by plaintiff, Rand testifying at an increased cost of "35% to 55%, considering the new work that they added, that and the increase in amount of work according to the contract." Plaintiff claimed that on account of Rand's breach the additional cost was $63,510.51, and that after putting Mr. Dicus and Mr. Wardrep on the project, Rand worked on the project some six weeks and quit, and this was done without legal excuse, and that he abandoned the contract. The testimony is voluminous, but the above, we feel, is about the jist.

In *Brady v. Oliver,* 125 Tenn., 595, 147 S. W., 1135, 1140, 41 L. R. A. (N. S.), 60, 1913 C. Ann. Cas., 376, in speaking of a partly performed building contract which the builder obviously was not going to be able to finish at the agreed time, the Court said: "While it is clear that time is of the essence of this contract, and is a material part of it, we do not hold that the complainant can anticipate a failure to perform within the time at so remote a period from the time of the performance as in this case, and annul the contract, charging the defendant with a disability to perform it. Conceding for the purpose of the point, that it was impossible for the defendant to do the work within the time, this cannot be said to be a total disability to perform the contract, nor such a disability as that, if the contract is performed under it, it would be something other and different from the thing contemplated by the parties. Certainly the defendant was able to perform the contract by an extension of the time limit. There was no defalcation in the grade and quality of the work. The defendant was entitled to a *pro tanto* performance for the full time limit, as long as he complied with the specifications of the contract in the performance, in order to reduce his liability for the breach. Had he failed to complete the contract within the time, he would be liable for such damages as complainant would have sustained because of the default, and likewise he was entitled to the benefit of all the money he could earn under it within the time. The complainant was not justified in doing anything that would increase the liability of the defendant, notwithstanding an immaterial breach. In all of the cases which we have seen, where the injured party has anticipated a breach and claimed a default justifying an abandonment of the contract, the disability to perform has been total, or the defendant has renounced the contract and refused to proceed under it. But those are quite different cases to this. The defendant not only had not refused to proceed under it, but was actively engaged in its performance. But merely because complainant had reason to believe that defendant would breach his contract, he was not justified in rescinding it in anticipation of the breach. In order to justify rescission, there must be actual default, unequivocal renunciation, or legal disability to perform." Williston on Contracts, Vol. 2, sec. 875 (note), p. 1679. *General Supply & Const. Co. v. Goelet et al.* (Court of Appeals of N. Y.), 148 N. E., p. 778, and cases cited.

The specifications were a part of the contract. Under definition of terms we find " 'Engineer'—The State Highway Engineer of the State of North Carolina, duly authorized by the State Highway Commission, acting either directly or through authorized assistants, by whom all explanations and directions necessary for the satisfactory prosecution and completion of the work will be given. . . . 'Annulment of Contract'—The contract, of which these specifications form a part, may be annulled by the State Highway Engineer for the following reasons: (1) Substantial evidence that the progress being made by the contractor is insufficient to complete the work within the specified time. (2) Failure on the part of the contractor to observe the requirements of these specifications. (3) Failure on the part of the contractor to properly make good any defects in materials or workmanship that may be pointed out to him by the engineer. *Before the contract is annulled the contractor and his surety will first be notified in writing by the State Highway Engineer of the conditions which make annulment of the contract imminent.* Fifteen days after this notice is given, if no effective effort has been made by the contractor or his surety to correct the condition complained of, the State Highway Engineer may declare the contract annulled, and notify the contractor accordingly."

It is contended by plaintiff that the district engineer had the power to annul—authorized assistant—but the assistant's power is limited to *"all explanations and directions necessary for the satisfactory prosecution and completion of the work will be given."* No power to annul is given him. Then again, this must be read in connection with annulment provisions. The contract was made between the plaintiff and defendants. The higher power made the contract—the contract provision was that the State Highway Engineer, a higher power, upon written notice could annul it for causes mentioned, not a subordinate—"Notice is due process." This annulment provision by the higher power was for the protection of all parties. This annulment must be done by the *State Highway Engineer.* But in the present case, District Engineer J. C. Walker gave no notice, as required, nor did the State Highway Engineer. The record discloses that this was never done by either. The written notice was never given to R. G. Rand or the Surety Company, as required by the contract, by the State Highway Engineer, nor did he annul the contract according to its terms.

Mr. Justice Connor, in *Ingram v. Bank, ante,* at p. 359, says: "The principle stated in *Edgerton v. Taylor,* 184 N. C., 571, is applicable upon the facts of the instant case. It is said in the opinion in that case: 'Sureties are favored by the law. Their obligations are ordinarily assumed without pecuniary compensation, and are not to be extended by implication or construction. They have a right, as we have said, to stand on the terms of their contract, and having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed, and it has been said to be insufficient that the surety may sustain no injury by a change in the contract, or that it may even be for his benefit.'" *Roper Lumber Co. v. Lawson, post,* 840.

In Page on the Law of Contracts, sec. 2609, p. 4583, it is said: "If a contract provides for notice, either by its express terms or by necessary implication, and either as a condition precedent to the duty of the party to whom notice is to be given to perform, or as a condition subsequent to terminating rights under the contract, full effect is given to such provision, and a substantial compliance therewith is necessary."

In *United States v. O'Brien,* 220 U. S., at p. 327, it is said: "The sole material express promise of the contractors was to complete the work by 1 July, 1902. If the work was done at that date that promise was performed, no matter how irregularly or within what delays in the earlier months. Under its terms the United States was not concerned with the stages of performance, but only with the completed result. See *Bacon v. Parker,* 137 Mass., 309, 311. Its interest in the result, however, made it reasonable to reserve the right to employ some one else if, when time enough had gone by to show what was likely to happen, it saw that it probably would not get what it bargained for from the present hands. But it would be a very severe construction of the contract, a contract, too, framed by the United States, to read the reservation of a right to annul, for want of a diligence not otherwise promised, as importing a promise to use such diligence as should satisfy the judgment of the engineer in charge. It is one thing to make the right to continue work under the contract depend upon his approval, another to make his dissatisfaction with progress conclusive of a breach. In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were turned off. It would be a very harsh measure to pronounce the contract broken when but for the prohibition of the United States the defendants might have done the work in time." *Cincinnati N. O. & T. P. Railway Co. v. Fidelity & Deposit Co. of Md.,* 296 Fed., p. 298. *On notice*—see *Rodemer v. Hazlehurst & Co.,* 9 Gill (Md.), p. 288; *Georgia R. & B. Co. v. Hass,* 127 Ga., p. 187.

In *Cincinnati N. O. & T. P. Ry. Co. v. Fidelity Co., supra,* under a contract for the construction of a railway track compliance with the requirement that railway chief engineer of construction certify to the railway that the contract was not progressing satisfactorily and that contractor was in default, *held* a condition precedent to railway's exercise of the right to take over and complete the contract on contractor's account.

The defendants prayed the court to give the following instruction: "If the jury shall find from the evidence that the plaintiff failed to give to the defendants, through the State Highway Engineer the written notices required by section No. 68 of the printed contract, and shall further find that without having given such written notices the plaintiff entered upon the construction of the road in question by placing thereon hands and equipment without the consent of the defendants, then the court charges you that such acts and conduct on the part of the plaintiff would be a wrongful interference with the defendants' right under said contract, and would constitute a breach of the contract by the plaintiff, and it would, therefore, be your duty to answer the fourth and fifth issues 'Yes.'"

The refusal to give this instruction, under the facts and circumstances of this case, we think, was error, and defendants entitled to a new trial. A provision in a contract may be waived. Page on the Law of Contracts, sec. 2664, p. 4687.

Brogden, J., in *Bixler v. Britton,* 192 N. C., at p. 201, says: "A written contract may be abandoned or relinquished: (1) By agreement between the parties; (2) by conduct clearly indicating such purpose; (3) by the substitution of a new contract inconsistent with the existing contract. *Redding v. Vogt,* 140 N. C., 562; *Lipschutz v. Weatherly,* 140 N. C., 365; *Public Utilities Co. v. Bessemer City,* 173 N. C., 482;

Faust v. Rohr, 167 N. C., 360." *May v. Getty,* 140 N. C., 310; *Palmer v. Lowder,* 167 N. C., 331.

In *Aiken v. Insurance Co.,* 173 N. C., at p. 403, it is said: "It is true, as asserted by counsel, that what amounts to abandonment is a question of law, just as what is negligence is a question of law; but whether there was an abandonment, or whether there was negligence, in any particular case is a mixed question of law and fact, the judge declaring what is the law and the jury finding what are the facts and applying the law to them."

Mr. Justice Holmes, in *Porto Rico v. Title Guaranty & S. Co.,* 227 U. S., at p. 382, closes his opinion with these words: "If, within the time allowed for performance, the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform."

We have not considered the other assignments of error; they may not arise on another trial.

For the reasons given there must be a

New trial.

W. W. HAGOOD, JR., AND SALLIE W. HAGOOD, EXECUTORS OF THE ESTATE OF W. W. HAGOOD, DECEASED, v. R. A. DOUGHTON AS COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 23 June, 1928.)

1. Taxation—Transfer Taxes—Nature and Constitutionality.

A statute imposing a tax upon the transfer of the estate of a decedent is not an inheritance tax, but a tax upon the right of devolution and transfer of property situate in this State, and is valid and constitutional.

2. Same.

Our State statute in basing the amount of tax upon the right to dispose of property situate in this State by will, etc., upon the amount deductible by the Federal statute for the benefit of the State, is not included in the amount to be received by the State as an estate or inheritance tax, but in addition thereto, and is not objectionable as an imposition of an arbitrary or capricious tax inhibited by Article I, sec. 17, of our State Constitution, or the Fourteenth Amendment to the Constitution of the United States.

3. Same.

Section 6, ch. 80, Public Laws of 1927, referring to the Federal statute allowing the State eighty per cent of the amount taxed by the Federal Government as a tax for the transfer of property by will or descent, is not objectionable on the ground that the amount of the tax is to be ascertained by reference to the Federal statute, or that the State statute authorizing it is not complete in itself.

4. **Same—Interference with Federal Taxing Powers.**

Section 6, ch. 80, Public Laws of 1927, by taxing the right to dispose of by will or devolution property situate in this State, does not interfere with the right of the Federal Government, or impose a burden upon it in the exercise of the power to tax the value of the estate.

5. **Statutes—Construction—Intent of Legislature.**

Where it is clear that a relative or qualifying word used in a statute would defeat the legislative purpose by referring it to its last antecedent, it will be so construed in relation to other words of the statute as to carry out the intent of the Legislature.

APPEAL by plaintiffs from *Cranmer, J.*, at February Term, 1928, of WAKE.

The plaintiffs and the defendant having agreed to the submission of a controversy without action under C. S., 626, submit the following as a case agreed, the facts hereafter set forth being those upon which the said controversy depends:

1. That W. W. Hagood died on 8 July, 1927, a citizen and resident of the State of North Carolina, leaving a last will and testament wherein the plaintiffs were appointed as executor and executrix of his said will.

2. That W. W. Hagood, Jr., and Sallie W. Hagood have duly qualified as executor and executrix of the estate of the late W. W. Hagood and as such are plaintiffs in this action.

3. That R. A. Doughton is Commissioner of Revenue of the State of North Carolina, and as such is defendant in this action.

4. That the General Assembly of North Carolina did by an act, ratified on 9 March, 1927, enact a certain statute entitled "An act to Raise Revenue," known as chapter 80 of the Laws of 1927; and the following is a copy of section six of said act, hereinafter referred to as the "Estate Tax Statute," the said section being in words and figures as follows, to wit:

"(a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act whether a resident or nonresident of the State. This tax shall be equal to that full percentage of the Federal tax, levied upon the same estate, allowed as a credit by the United States for payment of said tax to the State of North Carolina.

"(b) If the United States should discontinue the imposition of any estate, inheritance, legacy, or succession taxes, then in lieu of the tax levied in this section, a tax equal to eighty per cent (80%) of that imposed in the Federal 'Revenue Act of 1926' upon the transfer of net estates of decedents shall be levied and collected by the State of North Carolina.

"(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as modified by subdivision (a) of this section shall be computed in full accordance with the Federal law in force at the time of the death of the decedent, or, in case the Federal Government does not then impose such a tax, then in accordance with the estate tax law as contained in the Federal 'Revenue Act of 1926.'"

5. That upon the death of the plaintiffs' testator inheritance taxes in the amount of $10,001.31 became due and payable by the plaintiffs to the defendant and the said taxes have been paid in full.

6. That the Federal Government has assessed a Federal estate tax of $8,324.86 upon the transfer of the plaintiffs' testator's estate and has allowed a credit of eighty per cent of said assessment for taxes paid by plaintiffs to the State of North Carolina.

7. That the defendant claims and contends that by virtue of the estate tax statute, to wit, subdivision (a) thereof, upon the death of the plaintiffs' testator a North Carolina estate tax equal to eighty per cent of the Federal tax levied upon the same estate, to wit, the sum of $6,659.89, became due and payable and is now due and payable by the plaintiffs to the defendant.

8. The plaintiffs claim and contend that the estate tax statute does not impose any tax upon them whatsoever; that the tax assessed under that portion of the estate tax statute now operative, to wit, subdivision (a) thereof, is a tax equal to the percentage of credit allowed by the Federal Government on its estate tax for the estate tax paid to the State of North Carolina upon the transfer of the same estate; that the full percentage of credit allowed by the Federal Government, to wit, eighty per cent of the Federal estate tax, was allowed to the plaintiffs by the Federal Government on account of the inheritance taxes paid by them to the State of North Carolina; that no credit was allowed by the Federal Government for an estate tax, if any, due and assessed by the State of North Carolina upon the transfer of the plaintiffs' testator's estate and that, therefore, no tax is imposed upon the plaintiffs by the estate tax statute.

9. The plaintiffs further claim and contend that if the court should adopt the construction placed upon the estate tax statute by the defendant that the estate tax statute and all taxes due and assessed thereunder are invalid and illegal in that the said statute violates the Constitution of the United States and the Constitution of the State of North Carolina.

10. That the plaintiffs claim and contend that the said statute is unconstitutional upon the following grounds:

(a) That the tax as prescribed in the said statute is solely measured by and dependent upon the amount of credit given by the Federal Government for taxes paid upon the transfer of the same estate to the State of North Carolina, and that the said tax is, therefore, an interference with and a burden upon the exercise of the taxing power and policies of the government of the United States contrary to the Constitution of the United States and of the Constitution of the State of North Carolina, particularly of Article I, section 5 thereof.

(b) That the tax as prescribed in the said statute is solely measured by and dependent upon the amount of credit given by the Federal Government for taxes paid upon the same estate to the State of North Carolina, and that the rate of tax so deduced bears no reasonable proportion to the value of the exercise of power that is taxed. Therefore, (1) the rate of tax prescribed is purely arbitrary and capricious, having no reasonable relationship to the purposes and policies of taxation and amounts to the taking of property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and Art. I, sec. 17 of the Constitution of the State of North Carolina; (2) the classification resulting from the operation of the said act as to the persons who shall pay said tax and the amount of tax to be paid is not based upon any reasonable difference or distinction, but is arbitrary and capricious and deprives those upon whom the tax falls of equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; (3) that the amount or rate of tax is arbitrarily fixed without reference to the value of the exercise of the power that is taxed but by a standard bearing no relationship thereto or to the purposes or policies of taxation and transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems contrary to the Constitution of the United States and the Constitution of the State of North Carolina.

11. The defendant claims and contends that the tax imposed by the estate tax statute now operative, to wit, subdivision (a) thereof, amounts to eighty per cent of the Federal estate tax levied upon the transfer of the same estate without any regard to the amount of inheritance taxes paid upon the transfer of estate to the State of North Carolina or without any regard to the ratio of the Federal estate tax to the North Carolina inheritance taxes.

12. That the defendant claims and contends that the said statute does not contravene the constitutional provisions of either the Constitution

of the United States or of the State of North Carolina, and that the said statute is legal, valid, and enforceable.

13. That the controversy between the plaintiffs and the defendant dependent upon the facts hereinbefore set forth is that the defendant contends that by virtue of the estate tax statute the plaintiffs are indebted to the defendant in the sum of $6,659.89 for the estate tax assessed as hereinbefore stated, and the plaintiffs contend that the estate tax statute imposes no tax upon them whatsoever, but that if the court should construe the statute so that it did levy a tax upon the plaintiffs, that the said estate tax statute is illegal and invalid as hereinbefore stated, and that the plaintiffs are not indebted to the defendant in any sum whatsoever.

Upon the foregoing facts the judge of the Superior Court, being of opinion that section 6, chapter 80, Public Laws 1927, is not repugnant either to the State or to the Federal Constitution, adjudged that the plaintiffs are indebted to the defendant by virtue of the "Estate Tax Statute" in the sum of six thousand six hundred and fifty-nine and 89/100 dollars ($6,659.89). The plaintiffs excepted to the judgment and appealed to the Supreme Court.

Donnom W. Spencer for plaintiffs.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for defendant.

ADAMS, J. The controversy between the parties grows out of a difference of opinion as to the constitutionality and correct interpretation of an act of the General Assembly imposing a tax upon "the transfer of the net estate of every decedent dying after the enactment of the act, whether a resident or nonresident of the State." Public Laws 1927, ch. 80, sec. 6.

A transcript of the statute appears in the statement of facts. The tax imposed is an estate tax and is additional to and distinct from the inheritance tax provided for in the same schedule. The parties differ in their construction of the latter part of subdivision (a): "This tax shall be equal to that full percentage of the Federal tax, levied upon the same estate, allowed as a credit of the United States for payment of said tax to the State of North Carolina." The method of computation is given in subdivision (c): "The amount of the tax as modified by subdivision (a) of this section shall be computed in full accordance with the Federal law in force at the time of the death of the decedent, or, in case the Federal Government does not then impose such a tax, then in accordance with the estate tax law as contained in the Federal Revenue Act of 1926."

On 10 November, 1925, the National Committee on Inheritance Taxation published a report to the National Conference on Estate and Inheritance Taxation recommending that the credit provision of the Federal law then existing should be extended to allow a credit of all inheritance taxes paid to the several states up to eighty per cent of the Federal tax. Under the act of 1924 the allowable credit could not exceed 25 per centum of the tax thereby imposed. U. S. Compiled Statutes, sec. 6336$\frac{4}{5}$a. It was said that among the desirable objects to be accomplished by an extension of the provision would be a practical diminution of duplicate taxation by the Federal and State Governments and, if Congress should change the law so as to impose a reasonable burden upon estates, a strong incentive for all the states to promote uniformity by adjusting their rates so as to realize neither more nor less than the amount credited on the tax payable to the Federal Government. A part of these recommendations is included in the amended Federal act of 1926. This act, in lieu of the tax prescribed by Title 111, of the Revenue Act of 1924, imposed upon the transfer of the net estate of every decedent dying after the enactment of the act, whether a resident or nonresident of the United States, a tax equal to the sum of certain defined percentages of the value of the net estate, to be determined in the mode provided by the statute. The section allowing a credit for taxes paid the state is in these words: "The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any state or territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304." U. S. Compiled Statutes, sec. 6336$\frac{5}{8}$a (a), (b).

The plaintiffs say that the estate tax imposed by the General Assembly in 1927, equals the credit allowed by the Federal Government on its tax less the amount of inheritance taxes paid to the State of North Carolina, and as the inheritance taxes which the plaintiffs have paid the State exceed the credit allowed by the Federal Government on its tax, the State statute does not impose upon the plaintiffs any tax whatsoever—that is, that the tax imposed by the General Assembly equals the amount in which the existing inheritance tax laws of the State fall short of the credit allowable under the Federal law. It is contended that the statute automatically makes the total inheritance and estate taxes payable to the State equal the allowable credits and that the tax is to be levied only when these taxes are less than the determinable credit. The defendant, on the other hand, assails the position of the plaintiffs and insists that the State law imposes an estate tax which is equal to the credit allowed by the Federal law unaffected by the amount of any estate, inheritance, legacy, or succession taxes paid to the State.

In considering these conflicting views we must keep in mind the spirit and purpose of the statute and the nature of the tax it was intended to levy, it being conceded that the statute imposes some form of transmission or succession tax.

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor). Property chargeable with the tax is called a succession." Hanson's Death Duties, 40. It is said by Dos Passos in his work on Inheritance Tax Law, sec. 1, *et seq.*, that the system or policy of taxing inheritances, legacies, and successions is not of modern origin; that it is in force as a fruitful source of revenue among all European states and has existed in England for more than a century; that the right to take by will or from intestates is a mere privilege of the municipal law; and that the tax is a burden imposed by government upon gifts, legacies, inheritances, and successions, whether of real or personal property passing to certain persons by will, by intestate law, or by any deed or instrument made *inter vivos,* intended to take effect at or after the death of the grantor. The tax is not imposed upon property in the ordinary sense of the term but upon the right to dispose of it or to receive it—upon its transmission by will or descent. *United States v. Perkins,* 163 U. S., 625, 41 L. Ed., 287. In *Knowlton v. Moore,* 178 U. S., 41, 44 L. Ed., 969, *Mr. Justice White,* after reviewing authorities relating to the question, announced the following conclusion of the Court: "Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

An inheritance tax is laid on the transfer or passing of estates or property by legacy, devise, or intestate succession; it is not a tax on the property itself, but on the right to acquire it by descent or testamentary gift. *Magoun v. Bank,* 170 U. S., 283, 42 L. Ed., 1037; *Minot v. Winthrop,* 162 Mass., 113, 26 L. R. A., 259; *S. v. Alston,* 94 Tenn., 674, 28 L. R. A., 178. The State tax is levied by virtue of a right granted and controlled by the State law; but the right of the Federal Government to impose an estate tax exists by virtue of the excise tax power conferred by the Constitution of the United States—a distinction which is recognized in the section under consideration. Laws 1927, ch. 80, sec. 6(a); *New York Trust Co. v. Eisner,* 256 U. S., 345, 65 L. Ed., 963. "The Federal estate tax is not a tax on inheritances but an impost upon estates, levied before anything reaches the beneficiary. Theoretically this tax is on the transfer from the dead to the living imposed upon the right of the decedent to transmit his property and not upon the right of the beneficiary to receive it." Gleason and Otis Inheritance Taxation (3 ed.), 3; 4 Cooley on Taxation (4 ed.), sec. 1721.

The plaintiffs' analysis of the section just cited is this: The statute admits the existence of inheritance taxes, and the words "This tax" and "said tax" signify the estate tax levied under the State law, so that the latter part of section 6(a) should be construed as if it read as follows: "The North Carolina estate tax shall be equal to that full percentage of the Federal tax levied upon the same estate, allowed as a credit by the United States, for the payment of the North Carolina estate tax to the State of North Carolina." It is therefrom argued that the Federal Government has not allowed the plaintiffs an 80 per cent credit upon its tax for the payment of the estate tax under the State law, the credit having been allowed only for payment of inheritance taxes; that no basis has been laid for the apportionment between the two State taxes of the credit allowed by the Federal Government; and that the most reasonable construction of the statute is that the tax it levies equals the entire credit allowed by the Federal Government for the payment of taxes to the State less the amount of inheritance taxes paid to the State.

Construed literally the statute is not free from doubt. The legislative intent, we think, is less obscure. The statute went into effect 9 March, 1927. It should be interpreted in view of the fact that an inheritance tax, but no such estate tax as the statute provides for, had previously been paid to the State. Of this fact the General Assembly had full knowledge. The question raised by the appellants is whether "this tax" and "said tax" as used in the latter clause of section 6(a) should be construed as referring to the estate tax which the section imposes or whether "said tax" has reference to the inheritance tax previously paid the State. Should the statute be given a strict interpretation or one which has regard to the legislative intent? Where such intent is apparent it may not be defeated merely because not defined in the most complete and accurate language. If the words employed are ambiguous, or admit of more than one meaning, they are to be taken in such a sense as will effectuate the object of the statute—the reason being that its intended operation is not to be impaired by the use of inaccurate or improper terms. Black on Inter. of Laws, 151; *Fortune v. Comrs.,* 140 N. C., 322; *S. v. Johnson,* 170 N. C., 685; *S. v. Earnhardt, ibid.,* 725; *S. v. Bell,* 184 N. C., 701. It is not improbable that the Legislature intended that the words "said tax" in the last line of section 6(a) should qualify the words "inheritance tax" in the first line. "The rule that a relative or qualifying word refers to its last antecedent is not invariable. It will yield to the evident sense and meaning of the statute. . . . Particularly where a relative or qualifying phrase cannot be applied to its immediate antecedent without producing absurd results, or violating the evident purpose of the Legislature, the rule requiring such reference must be rejected; and in such a case, the phrase may be made to qualify any other part of the statute to which the intention of the Legislature, so far as it can be discovered, would seem to make it applicable." Black on Inter. of Laws, 223. For the present purpose, however, this question may not be important. It was manifestly not the purpose of the General Assembly in enacting section 6 to tax nothing more than the difference between the full percentage of the Federal tax allowed as a credit for the "payment of said tax to the State" and the amount of the inheritance tax or the inheritance and estate tax, when less than the credit allowed. It is true that since the enactment of the Federal Revenue Act of 1926, several of the states have imposed the tax only on the amount by which eighty per cent of the estate tax payable to the United States under the act shall exceed the aggregate amount of all estate, inheritance, legacy and succession taxes paid to the states; but section 6(a) imposes an estate tax equal to the full percentage of the Federal tax allowed as a credit by the United States for payment of "said tax" to the State, without any deduction whatever. Herein is the distinction between our statute and that of some other states. It is conceded, as contended by the plaintiffs, that the rate of taxation beginning at $100,000, the lowest sum taxable, increases until a point is reached where the State inheritance tax equals 80 per cent of the Federal estate tax and then diminishes until the percentage of increase on $10,000,000 is approximately the same as on $200,000; but the inequality of operation is due to the percentage of tax laid upon the several amounts taxable under the Federal statute and is equally forceful as an objection to its constitutionality. Moreover, it has been said that all systems of tax legislation produce unequal and unjust results in individual instances and if inequality in result must defeat the general law, then taxation becomes impossible. 1 Cooley on Taxation (4 ed.), sec. 223.

This construction of the statute involves the question of its constitutional sufficiency. It is contended by the plaintiffs that the statute thus construed is an attempted exercise of power by taxation which burdens and conflicts with the operation of the Federal law, and, as said in

Weston v. City Council of Charleston, 7 Peters, 449, 7 L. Ed., 481, "The powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt." It is urged specifically that this construction of the statute in effect annuls the Federal act—that the latter gives the taxpayer the credit and that the former takes it away from him, and that whatever the language in which the statute is framed, it is in reality a tax upon the credit given by the Federal law. The fact that the tax levied by section 6(a) upon the transfer of the decedent's net estate is equal to the full percentage of the Federal tax allowed as a credit does not necessarily import taxation of the credit itself. The statute taxes, not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. 4 Cooley on Taxation (4 ed.), sec. 1722. The credit given by the Federal statute is the measure adopted by the State for determining the amount of the tax to be levied under section 6, as the estate tax. It is said, however, that the standard employed by the State law does not attempt to reach the value of the thing upon which the tax purports to be levied. The Federal estate tax is assessed by the Federal Government upon the basis of a valuation determinable under the Federal statute. When the valuation is thus ascertained and the Federal estate tax is assessed and the credit is allowed, the value of the thing taxed by the State is definitely fixed. The standard of valuation is therefore not arbitrary. Section 6(b) provides that if the United States should discontinue the imposition of any estate, inheritance, legacy, or succession taxes, then in lieu of the tax levied in this section, a tax equal to 80 per cent of that imposed in the Federal "Revenue Act of 1926" upon the transfer of net estates of decedents shall be levied and collected by the State. In *Galveston Ry. Co. v. Texas,* 210 U. S., 217, 52 L. Ed., 1031, the act in question undertook to impose upon railroad corporations and other persons owning or controlling any line of railroad in the State a tax equal to one per cent of their gross receipts if the line of railroad was wholly within the State. The appeal was prosecuted mainly on the ground that the law upon which the action was based was an attempt to regulate commerce among the States. It was held that the statute levying the tax amounted to an attempt to regulate interstate commerce, the Court observing that there was no substantial distinction between a tax "equal to" one per cent of the gross receipts and a tax of one per cent of the gross receipts, except as the former phrase was the index of an actual attempt to reach the property and to let the interstate traffic alone, and that no such attempt had been found or anything to qualify the plain inference from the statute, taken by itself. The statute considered in *Northwestern Life Insurance Co. v. Wisconsin,* .... U. S.,........, 72 L. Ed., 65, purported to impose upon every company, corporation, or association within the State an annual license fee of three per centum of its gross income from all sources, etc. The tax was levied upon the company's entire gross income including interest on United States bonds. It was held that to this extent the tax was an imposition upon the bonds themselves and went beyond the power of the State, and that there is a clear distinction between a tax measured by gross returns and one which depends upon dividends or net receipts. In *Gillespie v. Oklahoma,* 257 U. S., 501, 66 L. Ed., 338, it appears that the statute therein construed undertook to levy a tax upon an instrumentality used by the United States in carrying out duties to the Indians that it had assumed. So it was in *Panhandle Oil Co. v. Mississippi,* Advance Sheets, 14 May, 1928. The decision in *North Dakota v. Hanson,* 215 U. S., 515, 54 L. Ed., 307, was based upon the ground that the requirement of the State law that receipts for the payment of the Federal internal revenue tax upon the business of selling intoxicating liquor be registered and published at the holder's expense placed a burden upon the lawful taxing power of the United States. As we read them neither these cases nor others cited in the appellants' brief on this point lead to the conclusion that the tax laid by the State law is arbitrary and illegal because dependent upon the credit given the taxpayer by operation of the Federal law. It is also apparent, in our opinion, that section 6(a) does not deny the plaintiffs due process of law or the equal protection of the laws. *Fire Association v. New York,* 119 U. S., 110, 30 L. Ed., 342; *Keeney v. New York,* 222 U. S., 523, 56 L. Ed., 299; *Wheeler v. Sohmer,* 223 U. S., 533, 58 L. Ed., 1031; *Nickel v. Cole,* 256 U. S., 223, 65 L. Ed., 900; *Stebbins v. Riley,* 268 U. S., 137, 69 L. Ed., 884.

It has been said that statutes of this nature are unconstitutional as involving an unlawful delegation of legislative power. Stated in another form, the contention is that their validity depends upon the legislation of some other state, and that they are therefore not in and of themselves a complete expression of the legislative will. This contention has been sustained in one state. But in all other states where this objection was urged the constitutionality of the statutes in this regard has been upheld. 14 C. J., A 1268.

There can be no doubt, we take it, of the State's right to levy an estate tax, although a similar tax is imposed on the value of the net estate under the Federal law. The two do not constitute objectionable or prohibited double taxation. To constitute such taxation the two taxes must be imposed on the same property, by the same state or government, during the same taxing period, for the same purpose. Indirect duplicate taxation is not objectionable. 1 Cooley on Taxation (4 ed.), sec. 223, *et seq.* It will be observed that the State law declares that in determining the clear market value of property taxed under its provision there shall be deducted Federal estate taxes and estate and inheritance taxes paid to other states. See *People v. Northern Trust Co.,* 7 A. L. R., 709, and Annotation; *Re Miller,* 16 A. L. R., 694, and Annotation; *Hollis v. Jackson,* 23 A. L. R., 849, and Annotation; *Tax Commission v. Lamprecht,* 31 A. L. R., 985, and Annotation.

Upon the agreed statement of facts appearing in the record we are constrained to hold that the statute enacted by the General Assembly of 1927 (ch. 80, sec. 6) is not repugnant to any provision of the State or Federal Constitutions. The judgment of the Superior Court is

Affirmed.

MARY SHEPARD, LAURA HUGHES, WASHINGTON BRYAN, AND WARDENS AND VESTRY OF CHRIST EPISCOPAL CHURCH OF NEW BERN, v. ALICE H. BRYAN, EXECUTRIX OF THE ESTATE OF JAMES A. BRYAN, AND CHARLES S. BRYAN AND ALICE H. BRYAN, INDIVIDUALLY.

(Filed 23 June, 1928.)

1. **Wills—Rights and Liabilities of Legatees and Devisees—Demonstrative Bequests.**

In disposing of a large estate by will, consisting of real and personal property, the testator devised by a certain item of his will to several legatees certain various amounts of money, to be paid by his executrix "out of the income from" his estate at her convenience, followed later by a general residuary clause: *Held,* construing the testator's intent from the whole written instrument, the legacies so given in the item were demonstrative bequests payable in money out of the gross income of the entire estate, bearing interest from one year after the qualification of the executrix, and any deficiency occurring is chargeable against the residuary legatee.

2. **Same.**

A demonstrative legacy is a bequest of money or other fungible goods, charged upon a particular fund so as not to amount to a gift of the *corpus* of the fund, or to evince an intent to relieve the general estate from liability in the event the fund fail, and so described as to be indistinguishable from other things of the same kind.

CLARKSON, J., not sitting.

APPEAL by defendants from *Harris, J.,* at November Term, 1927, of CRAVEN. Modified and affirmed.

Action by plaintiffs as legatees under the will of James A. Bryan, deceased, to compel an accounting by the defendant executrix and the payment of the legacies bequeathed in the third item of said will. The plaintiffs filed their complaint and the defendants filed separate answers, Alice H. Bryan in both her individual and her representative capacity.

James A. Bryan, a resident of Craven County, died on 30 January, 1923, leaving a will, dated 20 February, 1918, and probated 21 February, 1923, in the office of the clerk of the Superior Court of Craven. The following are the material items:

Second. "I direct that my just debts shall be paid by my executrix, and to this end I hereby authorize and empower her to sell and make title to a sufficiency of my timber and trees with the usual rights of way and terms of years to cut and remove the same to pay said debts, or she may sell in fee simple enough of my country lands to pay same and to make title to same, and I hereby charge my country lands with the payment of all my debts, so that said debts shall not have to be paid out of my personal estate."

Third. "I give and bequeath to my niece, Laura Hughes, $5,000; to my brother, Washington Bryan, $10,000; to my friend, Miss Mary Shepard, $2,000; and $5,000 to the Wardens and Vestry of Christ Protestant Episcopal Church of New Bern, N. C. All bequests in this item to be paid by my executrix out of the income from my estate and at the convenience of my executrix."

Sixth. "I give and bequeath to my beloved wife, Alice H. Bryan, all the capital stock that I shall own in the National Bank of New Bern, New Bern, N. C., at my death (my present holdings consisting of 501 shares standing in my own name, and one share standing in the name of Henry R. Bryan, Jr.); also 100 shares of the capital stock of the First National Bank of Durham, N. C.; also all my capital stock in the Atlantic Coast Line Railroad Company; also all my capital stock in the United States Steel Company or Corporation; also all the moneys due me at the time of my death by the Virginia Trust Company of Richmond, Va., and the Union Trust Company of New York City, and the National Bank of New Bern, New Bern, N. C., and any other bank or trust company; also all moneys that may be found in the iron safe in my library and in my lock box in the vault of the National Bank of New Bern; also all my horses, carriages, wagons, carts and harness."

Tenth. "All the rest and residue of my property of every kind and nature and wheresoever situate, not hereinbefore disposed of, I give, bequeath and devise to my beloved son, Charles S. Bryan, and to my beloved grandchildren, Gray Bryan, Mary Bryan and Margaret Bryan, share and share alike."

In the fourth item there is a legacy to each of certain servants; in the fifth, to the testator's daughter-in-law; in the seventh, a devise of the mansion and lot to his wife for life, with remainder in fee to the testator's son, Charles S. Bryan; in the eighth, a bequest of books, silver, etc., to his wife; and in the ninth a gift to her of a lease and rental made by him to the Craven Chemical Company.

The case was referred to J. C. Clifford, who made a report containing his findings of fact and conclusions of law. Exceptions were filed, and all the findings of fact were approved by the judge, except the eighth, ninth, seventeenth, nineteenth, and twenty-second, which were modified, and all the conclusions of law affirmed, except the fourth, which also was slightly modified.

The material facts were found to be these:

3. According to the inventory of the executrix, the testator's real estate at the time of his death was valued at $202,000, and his personal property at $311,000.

4-5. According to the inventory filed with the Commissioner of Revenue and the finding of the referee and judge, a fair value of the real estate was $237,600 and of the personal property $198,274.64.

6. In addition to the personal property, stocks and bonds of the total value of $150,491.

7. The testator's indebtedness, not including commissions to the executrix, was $135,347.37, and the net value of the estate at the time of the decedent's death was $411,389.36.

8. The testator owned 30,000 or 40,000 acres of timber lands, a part of which was sold, and he and the purchaser agreed on an adjustment whereby the testator received from the Blades Lumber Company $100,000, of which $25,000 was paid in cash and the residue of $75,000, represented by notes of the company, has since been paid, a portion thereof after the testator's death, and all these payments were credited upon the purchase price of lands sold to the Pamlico Lumber Development Company. After the death of the testator the executrix made a further contract with the Blades Lumber Company by which $25,000 additional was to be paid for other timber to be cut.

9. Subsequent to the execution of the will and prior to his death testator sold 30,000 acres of timber land or country land to the Pamlico Lumber Company at a recited consideration of $360,000, part of which was paid to testator in cash, certain commissions allowed, leaving a balance represented by notes payable to the testator in the sum of $322,000, these being secured by mortgage or deed of trust on the land conveyed. All of these notes were disposed of during testator's lifetime, with the exception of $129,560, included in the inventory of the executrix and the notes of J. B. Blades Lumber Company set forth in the inventory of the executrix.

10. The testator owned other country lands, not yet sold, of the value of $27,250.

11. All the James City property, *i. e.*, all the 600 acres not included in the leasehold estates or in the village proper, is country land, of the value of $75,000.

12. The testator was indebted to his son, Charles S. Bryan, in an amount which was agreed to be $107,534.12, and the executrix delivered to said Charles S. Bryan notes payable to the estate in the sum of $136,954.62, and he receipted for it as follows: In payment of the indebtedness of the estate to him, $107,534.12; in payment of legacies to him and his children, $29,420.50.

13. This compromise was made in good faith.

14. Prior to this, Charles S. Bryan's children had conveyed to him their interest in the testator's estate.

15. Alice H. Bryan, the executrix, has received in cash, or in notes treated and disposed of as cash since the death of her testator, including the notes delivered to Charles S. Bryan, $242,432.04, including $11,174, money borrowed by the executrix.

16. The executrix has disbursed and distributed, including the $136,954.62 in notes delivered to Charles S. Bryan, the sum of $236,278.98.

17. There has come into the hands of the executrix from dividends, rents, and interest collected, the sum of $65,303.20. In addition to these, the executrix has received on notes, money, etc., the sum of $29,073.48, all of which are accruals of the estate since the testator's death, not including any sum for the notes delivered to Charles S. Bryan.

18. The total expense charged by the executrix against this income is $53,563.44, consisting of items set out in the referee's report.

19. Included in the receipts of the executrix since the death of the testator is $3,295, interest, dividends, etc., due at the time of his death, but collected thereafter, and neither of the accounts for expenses of the estate includes commissions for the executrix or any unpaid sums due to attorneys.

20. One-third of the expense should be allocated to property specifically devised.

21. The lands mortgaged to secure the notes of the Pamlico Lumber Company in the sum of $129,560 were sold under the mortgage and purchased by Charles S. Bryan for $150,000, an expense account of $13,000 having been incurred in the sale, so that Charles S. Bryan received less than the principal and interest of his debt.

22. The total receipts were $242,432.04. The disbursements, not including unpaid attorneys' fees or commissions, embrace expenses which should be allocated to property specifically devised.

The conclusions of law are as follows:

1. It is apparent from an inspection of the will and from the facts found by the referee that the major part of the assets of the estate which were capable of yielding interest, profit, or dividend, were specifically devised. In the opinion of the referee the specific bequests and devises of interest-bearing property were intended to carry to the beneficiaries thereof the interest, profits and dividends, as well as the *corpus* of the

property so bequeathed or devised; that it is illogical to hold that the testator intended by the word "income" used in item third of the will, to restrict the payment of the bequests therein set forth to the comparatively small income derived from property not specifically bequeathed or devised. The referee, therefore, concludes that in directing that the bequests mentioned in item third should be paid out of the income from his estate, meant to direct that the same be paid out of the gross income of his estate coming into the hands of his executrix not specifically bequeathed or not necessary to pay debts or charges of administration.

2. That the authority given to his executrix in said item of the will to pay said legacies at her convenience should, in the opinion of the referee, be construed as authorizing her to pay the same in the orderly administration of the estate and within a reasonable time, considering all the circumstances surrounding the estate.

3. That the bequests set forth in item third of the will partake of the nature of demonstrative bequests or legacies as construed by the referee and it was the intention of the testator that the same should be paid within a reasonable time, notwithstanding the failure of sufficient funds in any definite source designated from which the same were to be paid.

4. That the executrix shall be recharged, if necessary, to pay the bequests mentioned in item three of the will, with the following items, to wit:

Bequest paid to residuary legatee	$29,420.59
Inheritance tax paid State of North Carolina	8,176.41
A just proportion of the carrying expenses charged to properties specifically bequeathed as set forth in finding of fact Nos. 18, 19 and 20	16,140.48
Total deductions	$53,737.39

which would leave a surplus in the hands of the executrix with which to pay legacies mentioned in item three of the will.

5. It was the duty of the executrix under the direction of item two of the will if necessary to sell all of the country real estate set forth in findings of fact Nos. 10 and 11, and the debts having been paid out of the personal estate, and a legacy in the sum of $29,420.50 having been paid to the residuary legatee, and the residuary legatee being one and the same person, to wit, Charles S. Bryan, the referee is of the opinion that the legatees mentioned in item three of the will have a right in equity to have the country land remaining unsold as set forth in findings of fact Nos. 10 and 11, subjected to sale by the executrix under the order of the court to place assets in her hands with which to discharge said legacies.

6. The referee is of the opinion and so concludes, that Charles S. Bryan, the residuary legatee and devisee, received of the executrix the bequest of $29,420.50, charged in equity as trustee to return the same into the estate to the extent that such return might be necessary in order to pay the bequests mentioned in item third of the will.

7. The referee concludes finally that the plaintiffs and each of them are entitled to recover of the executrix the respective bequests set forth in item three of the will, with interest, the same to be diminished, however, by any State tax properly assessable against such legatee, and which tax has been discharged by the executrix.

8. That they are entitled to an order that all of the country land or so much thereof as may be necessary be sold with which to discharge said judgment.

9. That they are entitled to a judgment and order of the court requiring Charles S. Bryan to return into the estate the sum of $29,420.50, or so much thereof as may be necessary to discharge this judgment.

10. That in the event of the discharge of said judgment by the executrix, that she is entitled to be reimbursed out of any funds or assets charged with the payment of debts or legacies which would otherwise go into the hands of the residuary legatee.

Upon the foregoing facts and conclusions of law it was adjudged that the plaintiffs recover the amount of their respective legacies, with interest; that they be paid by the executrix from any funds she has in hand belonging to the estate of the testator, and if such funds are insufficient for this purpose, that Charles S. Bryan repay to the executrix the sum of $29,420.50, the amount of the legacy paid him and his children, and to him as assignee of his children; and, further, that the executrix be required, if necessary, to sell and dispose of the country lands for the payment of the judgments rendered in favor of the plaintiffs, it appearing that the executrix has paid off and discharged a large amount of the indebtedness out of the testator's personal estate; also that the executrix, after paying the judgments, shall be reimbursed out of any funds or assets charged with the payment of debts and legacies which would otherwise go into the hands of the residuary legatees, etc.

The defendants excepted and appealed.

Cowper, Whitaker & Allen for Alice H. Bryan.

Ward & Ward for Alice H. Bryan, Executrix.

Stephen C. Bragaw and Thomas D. Warren for Charles S. Bryan.

Ernest M. Green for Anna G. Bryan (widow of Washington Bryan) and Mary Shepard.

Moore & Dunn for Laura Hughes and Wardens and Vestry of Christ Episcopal Church.

ADAMS, J. As affecting the controversy, legacies may be divided into three classes: General, specific, demonstrative. Are the bequests named in the third item of the will specific or demonstrative? To this paramount question most of the exceptions have direct or indirect relation.

A general legacy is a bequest which is chargeable generally upon the testator's personal estate, and is not so given as to be distinguishable from other parts of the estate. *McGuire v. Evans,* 40 N. C., 269; *Graham v. Graham,* 45 N. C., 297; *Smith v. Smith,* 192 N. C., 687.

A specific legacy is the bequest of a particular thing or money specified and distinguished from all of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor. *Graham v. Graham, supra; Smith v. Smith, supra.*

A demonstrative legacy is a bequest of money or other fungible goods, charged upon a particular fund in such a way as not to amount to a gift of the *corpus* of the fund, or to evince an intent to relieve the general estate from liability, in case the fund fail, and so described as to be indistinguishable from other things of the same kind. *Baptist University v. Borden,* 132 N. C., 476, 488; *Croom v. Whitfield,* 45 N. C., 143; *Kelly v. Richardson,* 100 Ala., 584; Annotation, 11 L. R. A. (N. S.), 61. Such legacies "are called demonstrative, and, like general legacies, are gifts of mere quantity, but differ from these by being referred to a particular fund for payment. They are so far general that, if the particular fund be called in or fail, the legatees will be permitted to receive their legacies out of the general assets; yet so far specific as not to be subject to abatement, with general legacies, on a deficiency of assets. They are thus specific in one sense and pecuniary in another; specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it, the mention of the fund being considered rather by way of demonstration than condition—rather as showing how and by what means the legacy may be paid than whether it shall be paid at all. *Smith v. Fitzgerald,* 3 Ves. & B. (Eng.), 2; Ward on Legacies, 21. A familiar instance given in the case last cited is a bequest of ten pounds which *J. S. owes to the testator;* when in truth J. S. does not owe any such money, the gift fails; but if he gives ten pounds, and wills that the same be paid out of the money he has in a certain place, or out of a particular debt due him, the devise is good, notwithstanding there should appear to be no money in the place or no such debt owing. The distinction seems to be this: If a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed, though the fund totally fail. But where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently, liable to be adeemed by the alienation or destruction of the object. In this, as in other questions springing from the construction of wills, the intention of the testator is principally to be ascertained, and it is said to be necessary that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will to constitute a legacy specific. If it be manifest there was a fixed and independent intent to give the legacy, separate and distinct from the property designated as the source of payment, the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate or fund specially named." *Walls v. Stewart,* 16 Pa. St., 275, 281, 282.

Each of the legacies in item three is a bequest of money charged upon a particular fund, not amounting to a gift of the *corpus,* and is so described as to be indistinguishable from other things of the same kind. We must, therefore, ascertain whether the will manifests an intention to relieve the estate from liability if the fund fail—that is, whether the testator intended to make the particular fund, not merely the primary, but the exclusive source of payment. On this point *Baptist University v. Borden, supra,* is not decisive, the item therein construed expressly providing for the payment in money of any deficiency in the bonds, stocks, and evidences of debt which were designated as the primary source. The appellants contend that the income is the only fund out of which these legacies can be paid; that the testator's dominant purpose and intention was to keep intact his personal property and his city and suburban real property for his wife, his son, and his grandchildren; and to permit nothing to interfere with his plan. The intention, however, is that which is expressed in the will and not that which may have existed in the maker's mind if at variance with the obvious meaning of his words. *McIver v. McKinney,* 184 N. C., 393. Conceding that the intention is controlling, we should nevertheless bear in mind the leaning of the courts against construing doubtful terms into a specific gift, because the gift is lost upon the failure of the fund from any cause, and because it is not subject to the equitable principle of equality by abatement. *Perry v. Maxwell,* 17 N. C., 488, 503. We should remember, too, that an intention to make a bequest specific must not only be clear *(McGuire v. Evans, supra),* but must either be expressed in reference to the legacy, or must otherwise plainly appear from the will. In the third item we find nothing inconsistent with the position that "the income from my estate" was pointed out as the primary, but not the exclusive, fund out of which the bequests are to be paid. Neither the word "exclusive" nor any of its synonyms was used to qualify the gifts or to circumscribe the fund. 52 L. T. N. S., 754. The terms of these bequests are not final, of course, but we arrive at the same conclusion when we explore the whole will in search of the expressed intention. In our opinion the testator had no doubt that all the legacies would be paid. According to the inventory filed by the executrix, he left an estate valued at more than $500,000—real estate, $202,000, and personal property, $311,000; he made provision for the payment of his debts; with the exception of about $25,000, he gave his entire estate to his wife and son; the legatees named in item three were given $22,000. True, the legacies in question were to be paid at the convenience of the executrix—a clause having regard to the necessity of delay in collecting the income from time to time, but not conferring upon the executrix authority to pay the legacies or to withhold payment in her unlimited discretion. Our conclusion is that the bequests appearing in the third item of the will are demonstrative and not specific.

Are these legacies to be paid out of the gross or the net income of the estate? The judge concurred in the referee's conclusion of law that the testator did not intend to restrict payment of the legacies to the income derived from property not specifically devised or bequeathed, but that the gross income not necessary to pay debts or charges of administration and not specifically bequeathed was chargeable with the payment. "Income" is defined as "that gain or benefit (usually measured in money) which proceeds from labor, business or property." Whether it imports gross or net income usually depends on the context and the subject-matter; for example, "an annuity to be paid from the income of my property," is held to be a charge upon the gross income. This, we think, is the sense in which the word was used in item three. It will be noted that these are not gifts of the income from his estate (40 Cyc., 1879), but gifts of money to be paid out of the income. The intention was to make these legacies a charge upon the gross income of the entire estate.

If there is a failure of the fund from which payment of the legacies is to be derived, what is the consequence? Liability to ademption is a distinctive feature of a specific legacy; and, as already indicated, a demonstrative legacy is so far specific that it is not liable to abatement with the general legacies upon a deficiency of assets, except to the extent that it is to be treated as a general legacy after the application of the fund designated for its payment. *Baptist University v. Borden, supra.* Treated in this sense and to this extent as general, the legacies in item three, if the fund fail, must be paid with other general legacies out of the residuary estate, if sufficient for this purpose. 28 R. C. L., 300, sec. 279.

While the legacies in item three are demonstrative, they are also pecuniary in the sense that they are to be paid in money; and the general rule is that pecuniary legacies bear interest from the end of one year after the testator's death. *Hart v. Williams,* 77 N. C., 426; *Moore v. Pullen,* 116 N. C., 284. This rule of law was not modified by the phrase "to be paid at the convenience of my executrix." As to the date from which the interest runs the judgment is free from error.

For the purpose and to the extent of satisfying the aggregate amount of these legacies, the executrix is chargeable with the gross income received by her from the estate of the testator since her qualification; and in case of a failure of this fund (which seems to be incompatible with the finding of facts), the residuary estate may be resorted to in order to make good the deficiency, total or *pro tanto,* including return of the legacy of $29,420.50 paid by the executrix to Charles S. Bryan.

We understand the judgment to provide that if the income has been diverted or improperly used for purposes to which other funds or property should have been applied, the funds or property intended for or properly applicable to these specific purposes may be substituted *pro tanto* for the diverted income, and in this conclusion we discover no error.

Our opinion is:

1. The legacies in item three are demonstrative.
2. That they are made a charge upon the gross income of the entire estate.
3. If the fund fail, the residuary estate is chargeable with the deficiency.

There are many exceptions to the court's findings of facts, but if there is any evidence to support the several findings, they are not subject to review on appeal to this Court; and we cannot conclude that either of them is without supporting testimony. Conclusions of law are sustained except in the respects in which the judgment is modified, and the judgment as modified herein is affirmed.

Modified and affirmed.

APPEAL BY CHARLES S. BRYAN

ADAMS, J. The trial judge made an order allowing the executrix certain commissions and attorneys' fees and held that each allowance is a reasonable charge against the estate. Charles S. Bryan excepted and appealed. Upon the facts disclosed, the allowances are not so excessive as to require a reversal of the order as a matter of law.

Affirmed.

CLARKSON, J., not sitting.

WILLIAM JOHNSON AND WIFE, MAGGIE JOHNSON, v. R. G. FRY, SHERIFF OF MOORE COUNTY, N. C., AND K. R. HOYLE.

(Filed 23 June, 1928.)

1. **Adverse Possession—Nature and Requisites.**

Adverse possession sufficient to ripen title is the exclusive use of the claimant for twenty years, continuously taking the exclusive benefits such as the land in question is capable of yielding, under known and visible metes and bounds. C. S., 430.

2. **Same—Presumption of Title out of State.**

It is not required that the plaintiff in an action to recover lands by twenty years adverse possession, C. S., 430, should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. C. S., 426.

3. **Judgments—Liens—Property Subject to Execution.**

Where a judgment debtor has lost title to lands by adverse possession of another, C. S., 430, prior to the acquisition and registration of the judgment, the judgment creditor is not entitled to execution on the *locus in quo*, the judgment debtor having no title at the time of the judgment, and this result is not affected by the giving of a deed by the debtor to the claimant, which was not registered until after the judgment. C. S., 614, 428, 3309, known as the Connor Act, have no application.

APPEAL by plaintiffs from *Oglesby, J.*, at December Term, 1927, of MOORE. Reversed.

This is a controversy without action. C. S., 626. The agreed statement of facts is as follows:

"1. That K. R. Hoyle recovered judgment against one Alex Evans for $200, with interest from 22 September, 1920, before Jesse Fry, J. P., which was duly transcribed and duly docketed and indexed in the office of the clerk of the Superior Court of Moore County as Judgment No. 12534, on 22 October, 1920.

2. That the said Alex Evans appealed therefrom to the Superior Court, and upon a hearing in the Superior Court thereon the judgment of the justice of peace was affirmed and judgment rendered in favor of K. R. Hoyle for the sum of $200, with interest from 22 September, 1920, together with the further costs of said appeal and the trial, the same having been docketed and indexed on 12 December, 1921, as Judgment No. 13002.

3. That Evander McIver, in 1886, entered into possession of the lands hereinafter described under one Ben Hicks, who was then the owner thereof, but did not receive a deed therefor from him; and the said Hicks conveyed said land to one Alex Evans subsequent to 1886, and prior to 1892; and said deed to Alex Evans was duly recorded in 1892;

that there was admitted to probate and registered in Book 93, at page 65, on 30 November, 1923, a warranty deed from Alex Evans to Evander McIver for the following described land: Adjoining the land of Easter Richardson, Cooley Cameron and others, in the town of Southern Pines, on the west side of McDeed's Creek, beginning at a stake the corner lots 4 and 5, running thence north 37½, 100 feet to a stake, corner lots 4 and 5, Eaglesfield's line; thence with the line of the Eaglesfield lot north 33 east 119 feet to a stake; thence south 60 east 95 feet to a stake the east corner of lots 4 and 5; thence south 33 west 150 feet to the beginning; that said deed recited a consideration of $75, and bore date of 14 May, 1892, and was executed and delivered on 14 May, 1892, the grantee named therein having already entered said lands six years prior to said date and having remained in possession thereof, and he and those claiming under him have continuously since the date of the deed in 1892, occupied and used the same claiming thereunder to be the owners thereof.

4. That there was admitted to probate and registered in Book 92, at page 28, on 30 November, 1923, a warranty deed from Evander McIver and Amy McIver, his wife, to Elicia A. Blue, for the following lands: In McNeill's Township, adjoining the lands of Easter Richardson and others in West Southern Pines, Moore County, North Carolina, beginning at a stake in James Torrence's line and running thence N. 37½ west 133 feet to a stake in the old Eaglesfield line; thence with the Eaglesfield line north 33 east 30 feet to a stake; thence 60 east 133 feet to a stake in Torrence's line; thence with said Torrence's line south 33 west 50 feet to the beginning; that said deed recites a consideration of $10 and love and affection, and bearing date of 10 May, 1907; and the said Elicia A. Blue immediately entered into possession of the same and occupied and claimed the same thereunder as her own until the execution of the deed described in the next paragraph, the northern portion thereof measuring approximately 50 by 100 feet, adjoining the Eaglesfield line, being embraced in the deed from Ben Hicks to Alex Evans and from Alex Evans to Evander McIver, described in the next preceding paragraph.

5. That on 10 December, 1919, Elicia A. Blue by deed recorded 19 December, 1919, conveyed to plaintiffs, W. M. Johnson and wife, the same land conveyed to her and that plaintiffs have occupied, used and claimed the same thereunder since said date.

6. That Evander McIver has conveyed to persons other than plaintiff all the balance of the lands conveyed to him by Alex Evans.

7. That by the judgments docketed prior to the judgment of K. R. Hoyle, and also prior to the docketing thereof the homestead of Alex Evans was allotted and the excess sold (the lands described in the deed

from Alex Evans to Evander McIver not having been levied on under said execution, and not having been sold thereunder, or included in the homestead of Alex Evans).

8. That the plaintiffs claim to be the owners in fee simple of the lands described in the statements of facts, free and clear of any lien by reason of the judgment of the defendant, K. R. Hoyle, and the right to have K. R. Hoyle's claim removed as a cloud on title and to an injunction, and that the said defendant, K. R. Hoyle, claims an interest therein and a lien on the portion derived from Alex Evans by virtue of the docketing of the judgment against Alex Evans hereinbefore described, and has caused execution to issue thereon, and has placed the same in the hands of R. G. Fry, his codefendant, who is the duly elected and acting sheriff of Moore County, and who will, unless restrained therefrom, sell the same to satisfy said execution.

9. That the judgment of K. R. Hoyle against Alex Evans is unpaid."

The judgment of the court below, after reciting certain facts, is as follows: "The court being of the opinion, and so holding, that by failure of the parties to record the deed from Alex Evans to Evander McIver, and from Evander McIver to Elicia A. Blue until after the docketing of said judgment against Alex Evans, the said judgment became a lien upon said lands, and that the possession of the grantees under said deeds was not adverse, but was subordinate to that of Alex Evans until the registration of said deed; it is decreed, ordered and adjudged: That the judgment of the defendant, K. R. Hoyle is a valid lien upon the lands of the plaintiff; that the motion of the plaintiff for a restraining order against the defendant be and the same hereby is denied; and the defendant, R. G. Fry, sheriff, is directed to proceed in said execution or an alias execution on such judgment, to make sale of the lands claimed by plaintiffs and embraced in the deed from Alex Evans to Evander McIver."

Johnson and Johnson for plaintiffs.
Hoyle & Hoyle for defendants.

CLARKSON, J. This is an action brought by plaintiffs against defendants to remove cloud from plaintiffs' title, C. S., 1743, and restrain a sale under execution.

"*Walker, J.*, in *Christman v. Hilliard,* 167 N. C., 4, speaking to this statute, says: 'The beneficial purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion.'" *Plotkin v. Bank,* 188 N. C., at p. 715.

The record discloses from the agreed facts that:

(1) Ben Hicks owned a certain piece of land in Moore County, N. C. Evander McIver went into possession of the land in 1886 under him, but received no deed from said Hicks.

(2) Ben Hicks, subsequent to 1886 and prior to 1892, conveyed said land to Alex Evans, which deed was duly recorded in 1892.

(3) Alex Evans on 14 May, 1892, executed and delivered a warranty deed to said land to Evander McIver; the deed recited a consideration of $75, the said McIver "having already entered said lands six years prior to said date and having remained in possession thereof and he and those claiming under him have continuously since the date of the deed in 1892 occupied and used the same, claiming thereunder to be the owners thereof."

(4) Evander McIver and Amy McIver, his wife, on 10 May, 1907, made a warranty deed to Elicia A. Blue, consideration $10 and love and affection, for a part of said land deeded Evander McIver by Alex Evans. She "immediately entered into possession of the same and occupied and claimed the same thereunder as her own until "she, on 10 December, 1919, by deed duly recorded on 19 December, 1919, conveyed the same land to plaintiffs and they "have occupied, used and claimed the same thereunder since said date."

(5) That Evander McIver has conveyed to persons other than plaintiffs all the balance of the lands conveyed to him by Alex Evans.

(6) K. R. Hoyle, the defendant, has a judgment duly docketed and indexed on the judgment docket in the Superior Court of Moore County, on 12 December, 1921, against Alex Evans for $200, and interest from 22 September, 1920, and costs, which constitutes a lien, on any land owned by Alex Evans at the time or thereafter acquired, for ten years. See C. S., 614.

(7) The warranty deed made, executed and delivered by Alex Evans on 14 May, 1892, to Evander McIver was not registered until 30 November, 1923, and the deed from Evander McIver and wife, Amy McIver, to Elicia A. Blue was not registered until 30 November, 1923.

The present action was commenced 20 June, 1927.

Evander Evans and those to whom the land in controversy has since been deeded have occupied and used said land, claiming thereunder to be the owners thereof, since 14 May, 1892. The judgment of K. R. Hoyle was docketed 12 December, 1921, some 28 years after the deed was made from Alex Evans to Evander McIver, which was not recorded until 30 November, 1923, after the Hoyle judgment was docketed 12 December, 1921.

Is the K. R. Hoyle judgment a valid lien on the land superior to plaintiffs' title? We cannot so hold.

To solve the question we must construe the following statutes:

C. S., 426 is as follows: "In all actions involving the title to real property title is conclusively deemed to be out of the State unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to 1 May, 1917."

C. S., 428: "When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title had descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession so held is a perpetual bar against all persons not under disability."

C. S., 429: "No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law."

C. S., 430: "No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, against all persons not under disability."

C. S., 3309: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies." The proviso not material. This is known as the Connor Act.

In *Moore v. Miller,* 179 N. C., at p. 398, in reference to R. S., 426, it is said: "It is well recognized that, in actions of this character, a litigant on whom rested the burden of the issue, suing for a small piece of land, with a view only of showing title out of the State, was called on to establish the location of some old grant, often of much larger boundary. Ancient of date, with the witnesses who could speak directly to the facts dead, many of the marks and monuments of boundary destroyed or obliterated, it was an effort entailing much cost and expense, and not infrequently threatening a miscarriage of justice, and this when it was fully understood that, if a prima facie case was established and the adversary required to offer proof, he too would insist on the position that title was out of the State. To remove this burdensome and untoward condition, the Legislature has enacted this most desirable statute providing that, in actions between individual litigants, title should be conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." See *Power Co. v. Taylor,* 194 N. C., 231.

This section having no retrospective effect is applicable only to actions commenced since 1 May, 1917. *Riddle v. Riddle,* 176 N. C., 485. This statute affects the remedy—mode of procedure—and is within the power of the General Assembly to pass. See *Brown v. Auto. Co., ante,* 647; *Williams v. Motor Lines, ante,* 682. Under well settled practice, where both parties claim title under the same grantor—a common source—it is sufficient to prove title derived from him, without proving his title, as neither party can deny such title, sometimes called an estoppel.

It will be noted that before the K. R. Hoyle judgment against Alex Evans, which was docketed 12 December, 1921, that Alex Evans had sold the land in controversy to Evander McIver, on 14 May, 1892, some 28 years before, although the deed was not recorded until 30 November, 1923, some 31 years thereafter. A deed is good and valid between the parties thereto without registration, and may be proved on trial as at common law. *Warren v. Williford,* 148 N. C., 474; *Weston v. Roper Lumber Co.,* 160 N. C., 263; *King v. McRackan,* 168 N. C., 621.

Under C. S., 430, "no action for recovery or possession of real property or the issues and profits thereof *shall be maintained* when the person in possession thereof or defendant in the action or those under whom he claims has possessed the property (a) *under known and visible lines and boundaries,* (b) *adversely to all other persons for twenty years,* and such possession so held gives a *title in fee to the possessor in such property* against all persons not under disability." *Walden v. Ray,* 121 N. C., 237; *Moore v. Curtis,* 169 N. C., 74; *Stewart v. Stephenson,* 172 N. C., 81; *Power Co. v. Taylor,* 191 N. C., 329; *Crews v. Crews,* 192 N. C., 679.

On the present record it cannot be disputed that plaintiffs and those under whom they claim, have possessed the property under known and visible lines and boundaries for more than twenty years before the judgment of K. R. Hoyle was docketed. Was it adversely to all persons for twenty years? We think so.

In *Locklear v. Savage,* 159 N. C., at p. 237-8, it is said: "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner," citing numerous authorities.

Under the *Locklear case, supra,* the property in controversy, it cannot be disputed, was held adversely by plaintiffs and those under whom plaintiffs claimed title for over twenty years—some twenty-eight years before the K. R. Hoyle judgment was docketed. When the Hoyle judgment was docketed, under the statute C. S., 430, *supra,* the plaintiffs had a statutory title in fee to the land. The lien of K. R. Hoyle judgment is based on C. S., 614, "and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquired at any time thereafter, for ten years from the date of the rendition of the judgment." At the time of the docketing of the judgment Alex Evans had no land; he had deeded it away, and plaintiffs had a title in fee under the statute. The K. R. Hoyle judgment claim is bottomed on the real property owned by Alex Evans at the time it was docketed. Alex Evans, under C. S., 429, was not seized or possessed of the land within twenty years. *Stewart v. McCormick,* 161 N. C., 625. Plaintiffs, and those under whom they claimed were in possession of the land in controversy, holding same adversely to Alex Evans, who made the original deed in the chain, under known and visible lines and boundaries for twenty-eight years before the Hoyle judgment was docketed.

We do not think that C. S., 428, and C. S., 3309, the Connor Act, is applicable to this controversy. Plaintiffs do not base their claim on seven years possession under color of title. An unregistered deed ordinarily is not color of title, except as between the original parties.

In *King v. McRackan,* 168 N. C., at 624, it is said: "Prior to the Connor Act of 1885, an unregistered deed was in all cases color of title if sufficient in form (*Hunter v. Kelly,* 92 N. C., 285), but after the passage of that act it was held in *Austin v. Staten,* 126 N. C., 783, that an unregistered deed was not color of title. The question was again considered in *Collins v. Davis,* 132 N. C., 106, and the ruling in the case of *Austin v. Staton* was modified so that it only applied in favor of the holder of the subsequent deed executed upon a valuable consideration, and the Court has since then consistently adhered to the latter decision. *Janney v. Robbins,* 141 N. C., 400; *Burwell v. Chapman,* 159 N. C., 209." See *Gore v. McPherson,* 161 N. C., 638; *Ennis v. Ennis, ante,* 320.

Plaintiffs do not base their claim to the land under C. S., 428, the unregistered deed which was not color of title, but under C. S., 429, and C. S., 430—twenty years adverse possession under known and visible lines and boundaries. Plaintiffs had title under these statutes before the judgment of K. R. Hoyle was taken against Alex Evans. *Eaton v. Doub,* 190 N. C., 14, relied on by defendants, is not applicable here. In that case it was held that an unregistered deed was not color of title, and the seven years statute requiring color of title could not prevail under C. S., 428, against a judgment creditor of the grantor. That case was a hard one and the humane *Associate Justice* who wrote it said, "We cannot refrain from expressing regret that after careful consideration of this case we are unable to arrive at any other conclusion."

In *Dill-Cramer-Truitt Corp. v. Downs, ante,* at p. 190, the whole matter is well and succinctly stated: "In actions involving title to real property, where the State is not a party, other than in trials of protested entries laid for the purpose of obtaining grants, the title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so. C. S., 426; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627; *Pennell v. Brookshire,* 193 N. C., 73; 136 S. E., 257. And in actions between individual litigants, as here, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. C. S., 428 and 430; *Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646; *S. c.,* 194 N. C., 231."

Succinctly—Evander McIver, without deed, had been in possession of the land in controversy some six years, and went into the possession under Ben Hicks, and since 1892 he and those in privity, including plaintiffs, occupied and used the land, claiming thereunder to be the owners thereof. Ben Hicks deeded the same land to Alex Evans, who registered the deed in 1892. Then Alex Evans deeded the land to Evander McIver, the party already in possession, on 14 May, 1892. This deed was not registered until 30 November, 1923. Evander McIver and those in privity, including plaintiffs, held the land in controversy under known and visible lines and boundaries for twenty-eight years before the K. R. Hoyle judgment was docketed against Alex Evans, 12 December, 1921.

The unregistered deed from Alex Evans to Evander McIver was good and valid between the parties. Evander McIver and those in privity, including plaintiffs, held the possession under known and visible lines and boundaries at least twenty-eight years, it goes without saying adverse to Alex Evans, as he parted with the title and possession and the possession was under known and visible lines and boundaries, necessarily adverse to Alex Evans and all other persons. The law, C. S., 430, steps in and says such adverse possession for twenty years so held gives a title in fee to the possessor of such property, the plaintiff, those in privity. Under the facts and circumstances of this case, if Evander McIver had no deed to the property in controversy, those in privity, the plaintiffs, under C. S., 430, would have a title in fee—*a fortiori*. Evander McIver had a good and valid deed, although not registered. It is a beneficent statute to shut out stale claims. Alex Evans had no interest in the land in controversy when K. R. Hoyle's judgment was docketed.

For the reasons given, the judgment below is

Reversed.

JOHN L. ROPER LUMBER COMPANY AND NORTHEAST RIVER LUMBER COMPANY v. LOUIS LAWSON AND J. V. BROOKE, PARTNERS, TRADING AS LAWSON & BROOKE, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 23 June, 1928.)

1. **Highways — State Highway Commission — Bonds for Performance of Contract of Construction—Laborers and Material Men.**

   The surety bond given to the State Highway Commission by a contractor for the construction of a highway under the provisions of our statute, Public Laws of 1925, ch. 200, contemplates the protection of laborers and materialmen who have no statutory lien. Const. of North Carolina, Art. X, sec. 4; Art. XIV, sec. 4.

2. **Same—Liability of Surety.**

   In determining the liability of the surety on a contractor's bond for the building of a State highway, the contract and the bond of indemnity will be construed together strictly in favor of the surety.

3. **Same—Surety Not Liable for Damages Caused by Negligent Injury to Land of Third Party.**

   The surety on a bond given by the contractor for the building of a State highway is not liable for damages caused to the lands of owners upon the route thereof by fires negligently set out by the contractor, or his employees, unless such liability has been clearly assumed under the contract and the bond of indemnity given therefor.

4. Same.

A clause in an indemnity bond against liability in the construction of a State highway, and protecting the laborers and material furnishers therein, to the effect that the contractor "also shall save and keep harmless the State Highway Commission all loss from any cause whatsoever," is for the protection of the Highway Commission, and does not include in the surety's liability a negligent loss by fire to an owner of lands along the route of the highway while being constructed.

5. Same—Statutes—Construction of Statutes.

Our statute of 1925 (ch. 260, sec. 3) providing a method for the enforcement of a lien of laborers and materialmen, etc., providing action may not be brought by any laborer, materialman or other person until after the completion of the highway contracted for, the term "or other person" applies to others of the class just enumerated, and the principle of *ejusdem generis* applies, and excludes torts committed by the contractor or its employees in negligently setting fire to lands along the route of the project, the subject of the contract.

STACY, C. J., not sitting.

APPEAL by defendant, United States Fidelity and Guaranty Company, from *Midyette, J.*, at November Term, 1927, of CAMDEN. Reversed.

This is an appeal from a judgment overruling demurrers filed by the defendant, appellant, United States Fidelity and Guaranty Company, the surety upon a bond given by Lawson & Brooke, as principals, for the faithful performance of a contract with the State Highway Commission for the construction of State Highway Project No. 112, in Camden County, North Carolina, known as the George Washington Highway. The plaintiffs allege damage to their lands, and other property, from a fire alleged to have been negligently set out by the contractors, Lawson & Brooke. Each of the several plaintiffs filed separate complaints, and the appellant filed separate demurrers thereto. Only one complaint, and one demurrer, each typical of all, are set forth in the transcript on appeal. All demurrers are directed to an alleged failure of the complaints to state facts sufficient to constitute a cause of action against the surety on the bond. All plaintiffs joined in one action in accord with acts 1925, chapter 260; Michie Cumulative Statutes, sec. 3846(v), having given the notice required by acts 1923, chapter 100; and having otherwise complied with the statutes applicable to the matter.

The complaints allege that the defendants, Lawson & Brooke, entered into a contract with the State Highway Commission for the construction of a State Highway in Camden County, in accordance with certain plans and specifications and certain obligations therein mentioned. That Lawson & Brooke gave a bond with the United States Fidelity and Guaranty Company, as surety, conditioned upon their faithful compliance with the terms of the contract and the conditions thereof, and of all their obligations thereunder, including those set out in the plans and specifications. That, among other things, these provided that the contractors should be held responsible for all damage done to private property growing out of their operations, should use every necessary precaution to prevent injury thereto, should be responsible for all damage to private property resulting from neglect, misconduct or omission, and that when any direct or indirect damage should be done they should restore same or make good such damage or injury in an acceptable manner.

It is alleged by plaintiffs that in August, 1926, while engaged in the prosecution of the work contemplated by the contract, and as a part and in furtherance of their operations they carelessly set out a fire in brush previously piled by them along the highway, or in growth near the highway, or negligently permitted such fire to be set out by others, leaving same unwatched and untended with the result that it spread to and burned the land, timber and other property of plaintiffs. The amended complaints also allege that these acts and omissions were in violation of the terms and stipulations of said contract.

The other necessary facts will be set forth in the opinion.

C. M. Bain, Savage & Lawrence, W. L. Devaney, Jr., Walcott, Walcott & Landford, McMullan & LeRoy and Thompson & Wilson for plaintiffs.

Connor & Hill, Walter L. Small and R. Clarence Dozier for defendants.

CLARKSON, J. Defendants, Lawson & Brooke, a partnership, on or about 12 May, 1926, made a contract with the State Highway Commission to construct or improve a certain section of the State highway system project No. 112, between South Mills, N. C., and the Virginia State line, in Camden County, 7.67 miles long, in accordance with certain proposals, plans and specifications, at a cost approximately estimated at $234,230.00. For the faithful performance of the contract, and to pay materialmen and laborers, for which the contractors were liable, the defendant, United States Fidelity and Guaranty Company, entered into a bond with the State Highway Commission in the penal sum of $117,115.00. In carrying out the contract it is alleged that Lawson & Brooke were guilty of actionable negligence in burning over a large portion of plaintiff's land, some 854 acres. Lawson & Brooke have completed the work contracted to be done. A statement of plaintiff's claims has been filed in accordance with the statutes. Is the bond liable for the *tort?* We think not.

The material part of the bond in controversy for the determination of the case, is as follows: "Now, therefore, the conditions of this obligation are such, that if the above bonded 'principal' as contractor, shall in all respects comply with the terms of the contract and conditions of said contract, and his, their and its obligations thereunder, including the specifications and plans therein referred to and made a part thereof, and such alterations as may be made in said specifications and plans as therein provided for, and shall well and truly, and in a manner satisfactory to the State Highway Engineer, complete the work contracted for, and shall save harmless the State Highway Commission of North Carolina from any expense incurred through the failure of said contractor to complete the work as specified, and from any damage growing out of the carelessness of said contractor, or his, their or its servant, and from any liability for payment of wages or salaries due or for material furnished said contractor, *and shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them or any of them, for all such labor and materials for which the contractor is liable,* and also shall save and keep harmless the said State Highway Commission of North Carolina against and from all losses to it from any cause whatever, including patent, trade mark and copyright infringements in the manner of constructing said project, then this obligation shall be void, or otherwise to be and remain in full force and virtue." Ordinarily a penal bond must be strictly construed and sureties have a right to stand on the terms of their contract. *Edgerton v. Taylor,* 184 N. C., 571; *Insurance Co. v. Durham County,* 190 N. C., at p. 61; *S. v. Carnegie,* 193 N. C., 467; *Ingram v. Bank, ante,* 357.

In recognition of the fact that those furnishing labor and material ordinarily can take no lien on public property, in their behalf a more liberal construction has prevailed. See United States Code, Annotated, Title 40, p. 95, and cases cited.

In *Brick Co. v. Gentry,* 191 N. C., at p. 639, it is said: "The obligation of the bond is to be read in the light of the contract it is given to secure, and ordinarily the extent of the engagement, entered into by the surety, is to be measured by the terms of the principal's agreement. *Brown v. Markland,* 22 Ind., App., p. 655; *Dixon v. Horne,* 180 N. C., 585; *Scheflow v. Pierce,* 176 N. C., 91."

We are not dealing with C. S., 2445, relating to bonds required to be given by any contractor with surety to any county, city, town or other municipal corporation, for the building, repairing, or altering any building, public road or street. See *Supply Co. v. Plumbing Co., ante,* 629.

We are not discussing the liability of the contractors, Lawson & Brooke, *but the liability on the present bond* to plaintiffs. The bond is not as clear as it could be written, but, under well settled law, its provisions should not be extended beyond the reasonable intent gathered from the purpose and language of the bond, and construed in connection with the proposals, plans and specifications and contract. It has been the policy of long standing in this jurisdiction, that liens are given to mechanics, laborers and materialmen. Even the homestead exemption cannot be claimed against mechanics' and laborers' liens. Art. 10, sec. 4, is as follows: "The provisions of sections one and two of this article shall not be construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises." Art. 14, sec. 4, is as follows: "The General Assembly shall provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor."

C. S., chap. 49, makes ample provision for "mechanics', laborers' and materialmen's liens." Ordinarily on public works, a lien statute did not apply, bonds were taken. The bond was intended to provide an equivalent or substitute for the legislation for the protection of laborers and materialmen. *Mfg. Co. v. Blaylock,* 192 N. C., 407; U. S. Code, Anno., *supra.* Usually, the contractor's bond was given guaranteeing the performance of the work on the part of the contractor, as in *McCausland v. Construction Co.,* 172 N. C., 708, and cases cited, and *Warner v. Halyburton,* 187 N. C., 414.

In *Gastonia v. Engineering Co.,* 131 N. C., at p. 365, it is said: "Though no mechanic's lien could be filed against the property, in the hands of the town, it was competent for the parties to contract, and they did contract that the engineering company should pay for 'all materials used and wages of all laborers employed by said contractor,' and the surety company became responsible for the execution of that stipulation." . . . (p. 367) "It would be well if every municipality which has public works executed should insert a similar provision in its contract for the protection of labor and materialmen, who are usually its own citizens. Indeed, in this contract it is further provided that all labor employed shall be 'home labor,' except as to such skilled labor as could not be found there, thus showing throughout that the labor and materialmen are beneficiaries in contemplation of the contracting parties."

In *Supply Co. v. Plumbing Co., supra,* at p. 635, it is said: "The General Assembly of 1923, chap. 100, Public Laws, *supra,* amended C. S., 2445, as we construe the matter, to meet the decisions in the above cases, so as to protect the laborers and materialmen, where the bond does not make provisions to pay them."

C. S., 2445, does not apply to the State Highway Commission. Carrying out the well known policy of the State, the State Highway Commission has had the bonds so drawn as to protect those who furnish material and perform labor in and about the construction of the roadway. *Trust Co. v. Highway Commission,* 190 N. C., 680.

In *Brick Co. v. Gentry, supra,* it is said: "The principle is well established by many authoritative decisions, here and elsewhere, that in determining the surety's liability to third persons on a bond given for their benefit and to secure the faithful performance of a building contract as it relates to them, the contract and bond are to be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285. In application of this principle, recoveries on the part of such third persons, usually laborers and materialmen, though not expressly named therein, are generally sustained where it appears, by express stipulation, that the contractor has agreed to pay the claims of such third persons, or where by fair and reasonable intendment their rights and interests were being provided for and were in the contemplation of the parties at the time of the execution of the bond. *Lumber Co. v. Johnson,* 177 N. C., 44; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Gastonia v. Engineering Co.,* 131 N. C., 363; *Morton v. Water Co.,* 168 N. C., 582; *Gorrell v. Water Supply Co.,* 124 N. C., 328." *Dixon v. Horne,* 180 N. C., 586; *Bank v. Assurance Co.,* 188 N. C., 747; *Town of Cornelius v. Lampton,* 189 N. C., 714; *Aderholt v. Condon,* 189 N. C., 748; *Plyler v. Elliott,* 191 N. C., 54; *Standard Sand and Gravel Co. v. Casualty Co.,* 191 N. C., 313; *Electric Co. v. Deposit Co.,* 191 N. C., 653; *Moore v. Material Co.,* 192 N. C., 418; *Wiseman v. Lacy,* 193 N. C., 751; *Glass Co. v. Fidelity Co.,* 193 N. C., 769.

Plaintiffs are contending that the bond is liable for the tort. We cannot so interpret the language of the bond, construed with the proposals, plans, specifications and contract. We think, after a careful examination of the proposals, plans, specifications, contract and bond, as disclosed by the record, that the bond was executed for a dual purpose. The covenant is two-fold:

(1) That the contractors, Lawson & Brooke (a) "shall well and truly, and in a manner satisfactory to the State Highway Engineer, complete the work contracted for and shall save harmless the State Highway Commission of North Carolina from any expense incurred through the failure of said contractor to complete the works as specified; (b) and from any damage growing out of the carelessness of said contractor and his, their, or its servants; (c) and from any liability for payment of wages or salaries due or for material furnished said contractor." This part is a contract of indemnity to the State Highway Commission of North Carolina, guaranteeing the performance of the work on the part of the contractor. *McCausland case, supra.* (2) (a) "And shall *well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway, all and every sum*

of money due him, them or any of them, for all such labor or material for which the contractor is liable." This is a direct obligation to pay all and every person the sums due them for the material and labor for which the contractor is liable. This is the extent of the surety liability to third persons on the bond given for their benefit; and it is well settled, as heretofore shown by numerous authorities, that recoveries by such third persons are permissible. (b) "And also shall save and keep harmless the said State Highway Commission of North Carolina against and from all losses *to it* from any cause whatever, including patent, trade-mark and copyright infringement in the manner of constructing said project." This part of the contract is also one of indemnity to the State Highway Commission.

In a bond similar to the present one we are construing, it is said in *Trust Co. v. Porter,* 191 N. C., at p. 674: "Here, the bond in suit was intended to perform a double purpose: 1. To insure the faithful performance of all obligations assumed by the contractor towards the State Highway Commission. 2. To protect third persons furnishing materials or performing labor in and about the construction of said roadway. *Plyler v. Elliott, ante,* 54; *Town of Cornelius v. Lampton,* 189 N. C., 714. In its second aspect, the bond contains an agreement between the obligors and such third persons that they shall be paid for whatever labor or materials they furnished or supply to enable the principal in the bond to carry out its contract with the State Highway Commission. *United States v. National Surety Co.,* 92 Fed., 549."

Public Laws 1925, ch. 260, sec. 3, in part, is as follows: "No action shall be brought upon any bond given by any contractor of the Highway Commission, by any *laborer, materialman,* or *other person* until and after the completion of the work contracted to be done by the said contractor. Any *laborer, materialman or other person* having a claim against the said contractor and the bond given by such contractor, shall file a statement of the said claim with the contractor and with the surety upon his bond," etc.

Plaintiffs contend that "This statute provides the method of enforcing claims against the bond given by the contractor. It not only refers to actions by laborers or materialmen, but specifically uses the words 'other person.' These words 'other person' when used with the words laborer or materialmen are broad enough to take in any person having a claim against the contractors."

We think the principle of *ejusdem generis* applies. "The statutory construction the '*ejusdem generis* rule' is that where the general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black, Interp. Laws, 141; *Cutshaw v. Denver,* 19 Colo. App., 341, 75 Pac., 22; *Ex parte Leland,* 1 Nott. & McC. (S. C.), 462; *Spalding v. People,* 172 Ill., 40, 49 N. E., 993." Black's Law Dic. (2 ed.), p. 415; *Bell v. Amer. Insurance Co.* (Wis.), 181 N. W., 733, 14 A. L. R., p. 179.

"Other person" may include *mechanic* used in the Constitution, in reference to giving a lien. The Constitution uses the words *mechanics* and *laborers.* It would make a penal bond like the present too elastic to say that *other person* is broad enough to take in any person having a claim against the contractor.

As stated in *Insurance Co. v. Durham County, supra,* surety bonds are ordinarily strictly construed, but the rule allowing third persons, materialmen and laborers, to recover on bonds, like the present, has been liberally applied to public contracts, taking the place of statutory liens, but extending this under the wording of the bond and statute to a tort for burning over plaintiff's lands, as in the present action, would go beyond the language of the bond and statute. At least, under the facts and circumstances of this case, we cannot extend the *other person* as contended for by plaintiffs. We do not think the proposals, plans, specifications, contract and bond admit of such a construction. The terms of the bond, construed with the proposals, plans, specifications and contract, contain no provision imposing an obligation to pay plaintiff's claims, or conferring on plaintiffs any right of action on the bond. Unquestionably, it is the public policy of this State, as will be observed under the highway statutes of the State, to build improved roads. Certainly this was the primary object of the statute. In order to build highways it is necessary, of course, that laborers and materialmen be satisfied that their just claims will be paid. The bond with this provision gives a credit to a contractor. This is the primary object of the bond required by the State Highway Commission and, of course, indemnifying the State Highway Commission against loss. If tort claimants are permitted to share in the amount of the bond equally with claimants for labor and material, such claimants can never be certain they will be paid, because a great many tort claims for personal injuries and injury to property would materially reduce or amount to perhaps, in some instances, more than the penalty of the bond. If actions for a tort like the present or personal injuries are contemplated, this should be fully and clearly provided for by the surety bond in reasonably clear language. The remedy of plaintiffs is against the contractors. If the contractors are insolvent, it is plaintiff's misfortune.

For the reasons given, the judgment below is
Reversed.

STACY, C. J., not sitting.

MRS. GLADYS PARKER COTTEN v. LAUREL PARK ESTATES, INC., CENTRAL BANK AND TRUST COMPANY, STANDARD MORTGAGE COMPANY, E. E. REID, YATES ARLEDGE, H. WALTER FULLER, AND A. O. GREYNOLDS.

(Filed 31 January, 1928.)

Pleadings—Demurrer—Misjoinder of Parties and Causes.

Held, in this case a cause of actionable fraud was alleged connecting all the parties with the grounds thereof, and is not demurrable for misjoinder of parties and causes of action.

APPEAL by defendants, Central Bank and Trust Company, Standard Mortgage Company, and E. E. Reid, from *Lyon, Emergency Judge,* at September Term, 1927, of MECKLENBURG. Affirmed.

Carswell & Ervin and John M. Robinson for plaintiff.

Hunter M. Jones, Merrick, Barnard & Heazel and Tillett, Tillett & Kennedy for Central Bank and Trust Company and Standard Mortgage Company.

Kester Walton for E. E. Reid.

PER CURIAM. The defendants demurred for misjoinder of causes of action and for misjoinder of parties, and appealed to the Supreme Court from the judgment overruling the demurrer.

The defendants argue, with persuasive but not convincing reasoning, that there is a misjoinder of causes of action and parties. That the complaint is bad for multifariousness; that the complaint contains inconsistent and contradictory causes of action. We cannot so interpret it. Taking the three causes of action, although inartificially set forth, as a whole—not disconnectedly—we think under a liberal construction, "with a view to substantial justice between the parties," it is one connected story—a common scheme, or plot, practically a conspiracy. The complaint alleges an actionable fraud of the most nefarious kind, connecting all of the defendants and charging, with particularity, all of them with full knowledge and complicity. The causes of action arise out of the same transaction or transaction connected with the same subject of action. All flow from the same source, all are woven together, yoked together, in a scheme, plot or conspiracy to defraud the plaintiff. "If the fountain is tainted, so likewise is the water that flows from it into all the streams." *Fisher v. Trust Co.,* 138 N. C., at p. 228. On a demurrer, the facts as stated in the complaint are taken as true. The entire matter can be settled by proper issues in one action. C. S., 456;

C. S., 507; C. S., 535; *Fisher v. Trust Co.,* 138 N. C., p. 224; *Robinson v. Williams,* 189 N. C., 256; *Wadford v. Davis,* 192 N. C., 484; *Killian v. Hanna,* 193 N. C., 17; *S. v. McCanless,* 193 N. C., 200. The judgment of the court below is

Affirmed.

JONAH COLLINS, ADMINISTRATOR OF JOHN THOMAS COLLINS, v. HYDE COUNTY LAND AND LUMBER COMPANY.

(Filed 22 February, 1928.)

1. **Trial—Nonsuit—Nonsuit Should Not Be Granted on Conflicting Evidence.**

   Conflicting evidence on the issues takes the case to the jury and overrules defendant's motion as of nonsuit.

2. **Negligence — Acts or Omissions Constituting Negligence — Particular Injury Need Not Be Foreseen.**

   It is not necessary that the particular injury should have been foreseen to recover damages for a negligent killing of plaintiff's intestate.

APPEAL by defendant from *Midyette, J.,* at November Term, 1927, of PASQUOTANK. No error.

Ehringhaus & Small for plaintiff.
S. S. Mann and McMullan & LeRoy for defendant.

PER CURIAM. This is an action to recover damages for negligently causing the death of the plaintiff's intestate. The defendant is engaged in the lumber business and maintains a railroad, logging road, cars, a skidding machine and other machinery used in cutting, skidding, loading, transporting, and unloading logs. On 1 August, 1923, the plaintiff's intestate as an employee of the defendant was engaged in the operation of a skidder hoisting engine. There is evidence tending to show that he was one of the skidder crew, which was in charge of Herbert Brewer, the defendant's foreman, and that Brewer directed the operation of the machine. For the purpose of bringing some cars from the main line into the siding leading to the skidder, the crew, under the direction of the foreman, ran a line or wire rope from the skidder to the cars, and in some way the rope "caught a piece of wood and whirled it so that it struck the plaintiff's intestate" and threw him on the siding under the moving cars. He died from the injury thus inflicted. The usual issues were submitted to the jury and answered in favor of the plaintiff, and from the judgment awarded thereon the defendant appealed, assigning error.

The first three assignments are addressed to the court's refusal to dismiss the action as in case of nonsuit and peremptorily to instruct the jury to answer the issue as to negligence in the negative and the issue as to contributory negligence in the affirmative. There is evidence of negligence on the part both of the intestate and of the defendant, and therefore in the denial of the motion and of the prayers for instructions there was no error. The remaining assignments are based on exceptions to instructions given the jury, but a careful examination of these instructions reveals no reversible error. A review of the authorities is unnecessary. The instruction that to constitute negligence it is not required that the employer foresee the injury which actually occurs is supported by a number of decisions extending from *Drum v. Miller,* 135 N. C., 204, to *Hall v. Rinehart,* 192 N. C., 706. We find

No error.

HUTTIG SASH AND DOOR COMPANY, INC., v. F. G. DAVIS, A. M. DAVIS AND WILSON DAVIS, PARTNERS, TRADING AS F. G. DAVIS LUMBER COMPANY.

(Filed 22 February, 1928.)

APPEAL by plaintiff from *Moore, Special Judge,* at October Special Term, 1927, of EDGECOMBE.

Civil action to recover of defendants, alleged to be partners trading under the firm name and style of "F. G. Davis Lumber Company," the sum of $1,000 for goods sold and delivered.

Judgment by default was entered against F. G. Davis, and upon motion of counsel for Addie M. Davis and Wilson Davis, nonsuit was entered as to them upon the ground that no competent evidence had been offered to show that they were partners or in any way liable for the debts of the F. G. Davis Lumber Company.

From the judgment of nonsuit, the plaintiff appeals, assigning errors.

H. D. Hardison and George M. Fountain for plaintiff.

Don Gilliam and H. H. Philips for defendants, A. M. Davis and Wilson Davis.

PER CURIAM. A careful perusal of the record fails to disclose any competent evidence, properly offered, sufficient to render Addie M. Davis or Wilson Davis liable for plaintiff's claim, either as partners with F. G. Davis in the lumber business or otherwise. Therefore, the nonsuit as to them must be upheld. This is the only question raised by the appeal.

Affirmed.

E. L. LUDFORD v. S. M. COMBS ET AL.

(Filed 22 February, 1928.)

1. **Appeal and Error—Review—Error Waived in Supreme Court—Rules of Court.**

   It is necessary that exceptions be mentioned in brief, with authorities and argument, or they will be deemed abandoned on appeal.

2. **Interest—Time and Computation—Judgments.**

   When interest is recoverable on amount of verdict, it will run from the date of the verdict, unless it can be legally determined before then. C. S., 2307.

APPEAL by plaintiff and defendants from *Midyette, J.*, at November Term, 1927, of TYRRELL.

Thompson & Wilson and W. L. Small for plaintiff.
Aydlett & Simpson for defendants.

DEFENDANTS' APPEAL.

PER CURIAM. Exceptions in the record not set out in the appellants' brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. Rule 28. The only exceptions relied on by the defendants are addressed to instructions given the jury, and in these instructions we find

No error.

PLAINTIFF'S APPEAL.

PER CURIAM. The judgment is affirmed. The amount due could not be determined before verdict. C. S., 2307.

Affirmed.

E. V. GASKINS v. MRS. EVELYN DUNNING MITCHELL, PERSONALLY, AND AS ADMINISTRATRIX OF W. G. MITCHELL, DECEASED, AND EVELYN DUNNING MITCHELL, INFANT.

(Filed 29 February, 1928.)

APPEAL by plaintiff from *Nunn, J.*, and a jury, at November Term, 1927, of BERTIE. No error.

Gilliam & Spruill for plaintiff.
A. T. Castello, Craig & Pritchell for defendant.

Per Curiam. The issues submitted to the jury and their answers thereto were as follows:

"1. Are the defendants indebted to the plaintiff, as alleged in the complaint, and if so, in what sum? Answer: No.

"2. Did the plaintiff warrant the said water system to give satisfaction and furnish a sufficient supply of water for the operation of a soda fountain, as alleged in the answer? Answer: Yes.

"3. If so, did the said water system fail to furnish a sufficient supply of water for the operation of said soda fountain, as alleged? Answer: Yes.

"4. If so, what damages are the defendants entitled to recover of the plaintiff by reason thereof? Answer: Not any. Mr. E. V. Gaskins shall have his water plant back."

This action was here before. *Gaskins v. Mitchell,* 194 N. C., 275. The proper issues were submitted to the jury in accordance with the former opinion of the action.

It was a question of fact for the jury. On the whole record, if error, it was harmless and not prejudicial.

No error.

W. S. COX ET AL. v. T. S. TYSON.

(Filed 7 March, 1928.)

Appeal by defendant from *Grady, J.,* at January Term, 1928, of Pitt. Affirmed.

F. C. Harding for plaintiff.
S. O. Worthington for defendant.

Per Curiam. John Carroll died leaving a will, one item of which is as follows:

"Item 3. I give and bequeath to my grandson, W. S. Cox, all of that tract of land whereon I now live, to have and to hold unto him and his bodily heirs in fee simple forever, but if he dies without leaving living bodily heirs, then it is my desire that the above land be equally divided between my son W. F. Carroll, and my daughter Emily L. Cox."

On 22 December, 1922, W. F. Carroll, and all of the heirs at law of Emily Cox, deceased, to wit: Ernest Cox, David Cox, Joseph Roscoe Cox, Bessie Cox, and Leona Cox, conveyed to the plaintiff, W. F. Cox, all of their right, title and interest in the lands referred to in Item 3 of said will by deed recorded in Book Q, 14, at page 293, in the office of the register of deeds of Pitt County.

W. S. Cox and wife thereafter executed a deed of trust on the devised land, under which it was sold and the defendant became the last and highest bidder. He declined to accept the trustee's deed on the ground that the trustee cannot convey a title in fee.

It was adjudged that the trustee can convey a good and indefeasible title in fee simple. The defendant excepted and appealed.

In our opinion the judgment is free from error. It is accordingly Affirmed.

COLLINS v. YOUNG.

(Filed 7 March, 1928.)

CIVIL ACTION before *Lyon, Emergency Judge,* at October Term, 1927, of HARNETT.

The plaintiff is the owner of the southern half of lot No. 2, Block B, as shown on the plan of the town of Angier. The defendant is the owner of the northern portion of lot No. 1 in said block. Lots 1 and 2 adjoin. After purchasing the land plaintiff erected a two-story brick building thereon and offered evidence tending to show that at the time his brick building was erected he set his northern wall six inches from his line. The defendant, who owns a lot to the south of plaintiff's lot, began the erection of a brick building and proposed to locate the northern wall of his building along the line of plaintiff's wall. Thereupon the plaintiff instituted this suit to restrain the defendant from erecting said wall upon the ground that the defendant's wall would overlap plaintiff's land six inches, "thereby placing about six inches of the defendant's building on the land of plaintiff, . . . which acts on the part of the defendant will deprive plaintiff of his property rights in said strip of land without due process of law and to his great danger and damage." The defendant denied that the six inches of land in dispute belonged to the plaintiff, alleging that he was the owner of the six-inch strip of land.

The court submitted to the jury the following issue: "Is the plaintiff the owner of the six inches of land in dispute?"

The jury answered the issue "No," and from judgment upon the verdict plaintiff appealed.

Dupree & Strickland and Young & Young for plaintiff.
J. R. Baggett and J. C. Clifford for defendant.

PER CURIAM. The plaintiff arrived at his true corner by measuring from the hub of the town, which was an iron stake or pin set in the ground about the corner of the McLeod building. The surveyor appointed by the court testified that the hub was the proper beginning point to locate any lot in the town of Angier, but testified further: "I could not find the hub, although I had it dug for. A brick wall was located at that point, but the hub or iron stake seemed to be missing." Other witnesses for plaintiff testified that they knew the location of the hub, and that the hub was at the corner of the McLeod building.

The judge charged the jury as follows: "So the burden in this case, gentlemen of the jury, is on the plaintiff to satisfy you from the evidence and by the greater weight of the evidence, that he is the owner of the six inches of land in dispute. That is all there is in dispute, six inches, between the lots or on the lots of plaintiff and defendant."

There was no specific exception to this charge.

Furthermore, the complaint alleged that the construction of the brick building, as proposed by the defendant, would overlap plaintiff's line about six inches and would deprive plaintiff "of his property rights in said strip of land without due process of law."

Construing together the pleadings, the charge of the court, and the issue submitted, it is obvious that an issue of fact only was presented. The jury has answered this issue adverse to the plaintiff, and we find no error in the record warranting a new trial.

No error.

MRS. VERNESSA TOWNSEND v. J. C. HOLDERBY ET AL.

(Filed 7 March, 1928.)

Removal of Causes—Diversity of Citizenship—Movant Must Allege Nonresidence.

The defendant, to remove a cause from the State to the Federal Court for diversity of citizenship, must allege his nonresidence in this State.

APPEAL by defendants from *Lyon, J.*, at November Term, 1926, of PITT. Affirmed.

The complaint alleges in part:

"That the said defendants did by their wilful misrepresentations and by their malicious, wrongful and persuasive advice and other inducements poison her said husband's mind against her, alienate his affections for her, cause him to mistreat and abandon her, thus separating them as husband and wife.

"That by so doing the said defendants have destroyed plaintiff's happiness and home forever; that they caused the loss of her said husband, his comfort and assistance, his affection and companionship, to her great damage in the sum of $35,000.

"Wherefore, plaintiff prays judgment against defendants jointly and severally, as follows:

"1. For compensatory damage $25,000.

"2. For punitive damages $10,000."

Walter G. Sheppard for plaintiff.

Gatling, Morris & Parker for defendants.

PER CURIAM. This was a civil action brought by plaintiff against defendants for loss of consortium. The principle upon which the action is bottomed is as follows: "So on the theory that under the modern statutes a husband and wife are entitled to the affection, society, coöperation, and aid of each other in every conjugal relation, and either may maintain an action for damages against any one who wrongfully and maliciously interferes with the marital relationship, and thereby deprives one of the society, affection and consortium of the other." See 13 R. C. L., "Husband and Wife," part sec. 494 and sec. 509.

The defendants petitioned for removal to the United States District Court. The petition does not allege that the defendants "being nonresidents of the State of North Carolina." The defendants made a motion before the clerk to amend their said petition to read, "They being nonresidents of the State of North Carolina." The petition for removal and motion to amend was denied by the clerk. The defendants appealed to the Superior Court. The judgment in the court below, in part, is as follows:

"And it appearing to the court from the record in said cause, and from the petition of removal, that said petition is fatally defective in that petitioners have failed to allege in their petition that the defendants were 'nonresidents of the State of North Carolina,' and it also appearing to the court that said allegation does not appear in the record of the cause, as is required by statute and the decision of the Supreme Court of North Carolina, and of the United States construing the same.

"It is therefore considered, ordered and adjudged that the said petition of the defendants for removal of said cause to the Eastern District of North Carolina, of the United States District Court be, and the same is hereby denied, and the order of the clerk of the Superior Court of Pitt County affirmed and the said cause is retained in the Superior Court of North Carolina for trial.

"It is further considered, ordered and adjudged that the order of Hon. J. F. Harrington, clerk of the Superior Court, denying the motion of the defendants to amend the said petition to read, 'they being nonresidents of the State of North Carolina,' after the phrase 'citizens of the State of Georgia,' be, and the same is hereby affirmed, and said action is denied." *Thompson v. R. R.,* 130 N. C., 140; *Springs v. R. R.,* 130 N. C., 186; *Morganton v. Hutton,* 187 N. C., 737.

We see no error. The judgment of the court below is
Affirmed.

LEON BROWN v. NATIONAL VENEER CO. ET AL.

(Filed 7 March, 1928.)

Appeal by defendant, National Veneer Company, from *Harris, J.,* at September Term, 1927, of Pitt.

Motion by nonresident corporation to remove cause to the District Court of the United States for the Eastern District of North Carolina for trial. Motion denied, and movant appeals.

Albion Dunn and Peter R. Hines for plaintiff.
F. C. Harding for defendant, National Veneer Company.

Per Curiam. The facts appearing on the present record are so nearly identical in principle with those in *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238, as to cause the instant case to be controlled by the decision rendered therein. The motion was properly denied.

Affirmed.

C. S. SOUTHERLAND v. W. T. CRUMP, Executor of J. A. Southerland, Deceased.

(Filed 14 March, 1928.)

Contracts—Actions—Plaintiff Must Show Performance in Order to Recover.

To recover on an express contract with decedent for personal services rendered him prior to his death, plaintiff must show performance on his part.

Appeal by plaintiff from *Cranmer, J.,* at August Term, 1927, of Duplin. Affirmed.

Action to recover upon an express contract alleged to have been entered into by and between plaintiff and the testator of defendant for services rendered by plaintiff to said testator.

From judgment dismissing the action, upon motion for nonsuit, at close of all the evidence, plaintiff appealed to the Supreme Court.

Oscar B. Turner for plaintiff.

H. D. Williams, Geo. R. Ward and W. H. Weatherspoon for defendant.

PER CURIAM. Conceding that there was some evidence tending to sustain plaintiff's allegation of an express contract by which defendant's testator agreed to pay plaintiff for services to be rendered to him by plaintiff, there was no error in the judgment dismissing the action, at the close of all the evidence, under C. S., 567. There was no evidence tending to show performance by plaintiff of the alleged contract.

In the absence of such evidence, plaintiff cannot recover in this action. The judgment is

Affirmed.

STATE v. ELLIS JARMAN.

(Filed 14 March, 1928.)

APPEAL by defendant from *Cranmer, J.,* at December Term, 1927, of LENOIR. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

P. D. Croom for defendant.

PER CURIAM. The defendant was found guilty of aiding and abetting in the manufacture of intoxicating liquors. The defendant made a motion for judgment of nonsuit at the close of the State's evidence and at the conclusion of all the evidence. C. S., 4643. These motions were refused by the court below, and in this we think there was no error.

Without reciting the evidence on the part of the State, we think it was sufficient to be submitted to the jury.

No error.

GREENVILLE BANKING AND TRUST COMPANY v. T. H. NICHOLS AND G. V. SMITH.

(Filed 14 March, 1928.)

APPEAL by defendant, G. V. Smith, from *Lyon, Special Judge,* at November Term, 1927, of PITT.

Motion to set aside judgment rendered by a justice of the peace on a promissory note for $50, executed by T. H. Nichols and endorsed by G. V. Smith, on the ground that no copy of the summons was left with the appealing defendant. Motion overruled, and the defendant, G. V. Smith, appeals.

W. A. Darden for plaintiff.
J. Con Lanier for defendant, G. V. Smith.

PER CURIAM. The defendant appeals, relying on *Pass v. Elias,* 192 N. C., 497; 135 S. E., 291. But the defect in the service of summons was cured by a general appearance. *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175; *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1; *Currie v. Mining Co.,* 157 N. C., 209, 72 S. E., 980; *Scott v. Life Asso.,* 137 N. C., 515, 50 S. E., 221.

Affirmed.

STATE v. SAREE OSBORNE.

(Filed 14 March, 1928.)

APPEAL by defendant from *Crammer, J.,* at October Term, 1927, of LENOIR.

Criminal prosecution tried upon a warrant charging the defendant with violations of the prohibition law.

From an adverse verdict and judgment pronounced thereon, the defendant noted an appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
S. H. Newberry and Sutton & Greene for defendant.

PER CURIAM. The State moved to dismiss the appeal for failure to docket in proper time. As the exceptions are without merit, the verdict and judgment will be upheld.

No error.

STATE v. ARTHUR EDWARDS.

(Filed 14 March, 1928.)

APPEAL by defendant from *Cranmer, J.,* at October Term, 1927, of LENOIR. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Cowper, Whitaker & Allen for defendant.

PER CURIAM. The defendant was convicted of a breach of the prohibition law, and from the judgment pronounced he appealed to this Court upon error assigned. We have considered each of the exceptions, and find no reversible error in the record.

No error.

MRS. ARTHUR S. BRINKLEY AND HER HUSBAND v. THE PULLMAN COMPANY, INC.

(Filed 21 March, 1928.)

APPEAL by plaintiffs from *Townsend, Special Judge,* at November Special Term, 1927, of WAKE. No error.

Action to recover the value of a diamond and platinum bar pin, alleged to have been lost by the *feme* plaintiff, while a passenger on a sleeping car of defendant, at Raleigh, as the result of the negligence of defendant, or of the theft of said pin by defendant's porter on said car.

From judgment on the verdict, plaintiffs appealed to the Supreme Court.

Manning & Manning for plaintiffs.

Pou & Pou for defendant.

PER CURIAM. The judgment upon the verdict rendered at the trial of this action in the Superior Court must be affirmed, unless there was error prejudicial to plaintiffs, as contended by them upon their appeal to this Court, in the instructions given to the jury by the court, or in the refusal to give instructions as requested by them, pertinent to the first issue. This issue was answered adversely to the contentions of plaintiffs. There are no assignments of error based upon exceptions to the admission or exclusion of evidence.

An examination of the entire record, and a careful consideration of the assignments of error presented for our consideration by plaintiffs' appeal, disclose no error for which the judgment should be set aside and a new trial ordered. Upon the facts as all the evidence tended to show, there was no error in the instructions given. Nor was there any error in the refusal to give the instructions requested by plaintiffs. According to the testimony of the *feme* plaintiff, the bar pin was not lost while she was asleep in her berth; it was lost while she was absent from her berth, in the dressing-room of the car, where she had gone to make her toilet, preparatory to leaving the car in the morning, after the arrival at Raleigh. She testified that she left the pin in the berth, and that upon her return it had disappeared.

The evidence relied upon by plaintiffs to sustain their contentions that the pin was lost as the result of the negligence of defendant, or of the theft of the pin by defendant's porter, while the *feme* plaintiff was in the dressing-room, was submitted to the jury, under the instructions of the court, which are free from error.

The verdict was adverse to the contentions of plaintiffs, and the judgment must be affirmed.

No error.

F. A. FETTER v. C. R. BOONE.

(Filed 21 March, 1928.)

APPEAL by defendant from *Sinclair, J.,* at Second October Term, 1927, of WAKE. No error.

There were two issues:

1. Is defendant, Boone, indebted to plaintiff, Fetter? Answer: Yes.
2. If so, in what amount? Answer: Whole amount—$193.48.

Judgment for plaintiff; appeal by defendant.

J. C. Little for plaintiff.
Briggs & West for defendant.

PER CURIAM. The plaintiff was the district agent of the Jefferson Standard Life Insurance Company, and through him the defendant applied to the company for a loan of about $60,000 to be secured by a mortgage on a store building situated on Fayetteville Street in the city of Raleigh. The Metropolitan Life Insurance Company held a first mortgage on the property and the loan by the Jefferson Company was dependent upon the defendant's success in canceling the first lien.

Upon assurance that the outstanding mortgage would be taken up the Jefferson Company issued the policies and sent them to the plaintiff, who testified in part as follows: "There seemed to be some trouble about getting the Metropolitan loan canceled, but, in the meantime, Mr. Boone stated that he was sure the Metropolitan loan could be paid up and instructed the attorney to proceed to examine the title. Judge Harris examined the title and Mr. Boone paid him the fee for doing so. When I talked to Mr. Boone about the policies he said he was having trouble in getting the Metropolitan loan canceled, and I saw Mr. Drake myself. Mr. Drake said that he thought the matter could be arranged satisfactorily, and as he had to go to New York he would handle the matter personally. I kept in touch with Mr. Boone almost daily and advised him that if the policies were held longer there would be some expense attached to it, and Mr. Boone requested me to hold the policies, and stated that he would pay the expense, as he expected to go to New York himself and take the Metropolitan matter up with that company personally. The expense was $183.48 for the cancellation charge and $10 medical examination fees. I paid this expense to the company, and this is what Mr. Boone agreed to pay me."

The defendant's evidence was inconsistent with that of the plaintiff, and the controversy was submitted to the jury.

The exceptions present the sole question whether the action should have been dismissed as in case of nonsuit. The plaintiff's evidence, which cannot be disregarded, is manifestly sufficient to sustain the verdict.

No error.

A. J. MEDLIN v. TOWN OF WAKE FOREST.

(Filed 21 March, 1928.)

Trial—Instructions—Form, Requisites and Sufficiency.

An exception to the charge that the word "substantial" was unduly repeated as to the damages recoverable is not sustained under the facts of this case.

APPEAL by plaintiff from *Townsend, J.,* at November Special Term, 1927, of WAKE. No error.

This is an action by plaintiff against defendant for actionable negligence. For negligently paving and constructing its streets without providing adequate drains and culverts so that surface water was collected and concentrated, in an artificial drain, causing an unnatural flow of water in manner, volume and mass which was thrown on plaintiff's lot causing substantial injury, for which damage is asked.

N. Y. Gulley and Douglass & Douglass for plaintiff.
Mills & Mills and Pou & Pou for defendant.

PER CURIAM. The issues submitted to the jury and their answers thereto, were as follows:

"1. Has the property of the plaintiff been injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

"2. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: ...."

The record discloses that by agreement "the jury is allowed to go to Wake Forest and view the place."

From a careful inspection of the record, we think the charge is sustained by the rule laid down in this jurisdiction. *Yowmans v. Hendersonville,* 175 N. C., p. 574; *Eller v. Greensboro,* 190 N. C., 715; *Gore v. Wilmington,* 194 N. C., 450.

The learned counsel for plaintiff in their brief say: "By the frequent use of the word 'substantial' in the charge, with no explanation as to its application, his Honor misled the jury."

The court below was not called upon in the charge to the jury to define "substantial injury" or "substantial damage." No prayer for instruction to that effect was requested. Black's Law Dictionary, 2 ed., p. 1117, defines "substantial damage": "A sum assessed by way of damages, which is worth having; opposed to nominal damages, which are assessed to satisfy a bare legal right. Wharton."

Before closing the charge to the jury, the court asked if there were any other phases of the evidence or any other contentions that either side desired called to the attention of the jury, and counsel for both sides stated there were none.

The matter was a question of fact for the jury. In law we can find No error.

SARAH BRIDGERS v. S. D. GRIFFIN.

(Filed 28 March, 1928.)

Appeal and Error—Record—Exceptions—Rules of Court.

The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of Court regulating appeals.

APPEAL by plaintiff from *Sinclair, J.,* at October Term, 1927, of WAKE. Appeal dismissed.

Action under C. S., 2357, for settlement of controversy between the parties, arising out of their relationship as tenant and landlord for the year 1925. The amount claimed by plaintiff is $200 or less.

The action was begun by summons issued by a justice of the peace of Wake County, dated 20 January, 1926, and returnable on 30 January, 1926. Defendant appeared on the return day when the action was tried. No judgment was rendered on said day. Thereafter without notice to defendant, and in his absence, judgment was rendered that plaintiff recover of defendant the sum of $200, interest and costs. This judgment was entered on the docket of the justice of the peace on 5 April, 1926. A transcript of said judgment was subsequently docketed in the office of the clerk of the Superior Court of Wake County, and execution issued thereon against defendant on 7 June, 1927. Defendant had no notice prior to the service of said execution of the rendition of said judgment in favor of plaintiff and against defendant. For this reason defendant did not appeal from said judgment.

The action was thereafter docketed in the Superior Court of Wake County for trial, pursuant to a writ of *recordari,* issued upon petition of defendant, filed with the judge presiding in said court on 14 June, 1927.

At the trial in the Superior Court the issues submitted to the jury were answered as follows:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: No.

"2. Is the plaintiff indebted to the defendant, and if so, in what amount? Answer: No."

From judgment in accordance with the verdict plaintiff appealed to the Supreme Court.

S. W. Eason for plaintiff.

Wm. B. Jones, J. S. Griffin and R. N. Simms for defendant.

PER CURIAM. The transcript, docketed in this Court, upon plaintiff's appeal, does not comply with the Rules of Practice, revised and adopted at Fall Term, 1926, of this Court. See 192 N. C., 837.

There are no assignments of error based on the exceptions which appear in the case on appeal. The exceptions on which plaintiff relies are not grouped and numbered separately, as required by Rule 19, sec. 3.

An examination of the record fails to disclose sufficient grounds upon which the transcript in this case should be referred by the Court, in its discretion, as permitted by the Rules, to the clerk or to some attorney, for a statement of the exceptions as required thereby.

No exceptions were taken during the trial in the Superior Court, where the action was heard upon its merits; all the exceptions appearing in the case on appeal are directed to the issuance of the writ of *recordari,* pursuant to which the action was docketed in the Superior Court for trial *de novo.* These exceptions not having been grouped and numbered separately, as required by the above cited rule, have not been considered by the Court.

Transcripts of the record, including the case on appeal, as agreed upon by the parties, or as settled by the judge, docketed in this Court, must conform to its Rules. Otherwise the appeal will be dismissed, unless upon an examination of the transcript the Court shall, in its discretion, refer the transcript to the clerk or to some attorney, as permitted by the Rule, with direction to revise the same to make it conform to the Rule. *Thresher Co. v. Thomas,* 170 N. C., 680. Rules of Practice have been adopted by this Court, in the exercise of the power conferred upon it by the Constitution, in order that its large and constantly increasing volume of business may be dispatched promptly.

Appellant having failed to comply with Rule 19, sec. 3, her appeal is
Dismissed.

E. L. BROOKS v. GILMERS, INC.

(Filed 28 March, 1928.)

APPEAL by defendant from *Townsend, Special Judge,* at October Special Term, 1927, of WAKE.

Civil action to recover damages for an alleged negligent injury, in that plaintiff, while working for the defendant at its store or place of business in Raleigh, fell through an elevator shaft and seriously and permanently injured himself, the elevator having been moved without closing the entrance door.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered thereon the defendant appeals, assigning errors.

Douglass & Douglass and F. T. Bennett for plaintiff.
Thos. W. Ruffin and Tillett, Tillett & Kennedy for defendant.

PER CURIAM. Without stating the facts, some of which are in dispute, we are convinced, from a careful perusal of the record, viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, that the case was properly submitted to the jury. No benefit would be derived from detailing the evidence, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

No error having been made to appear, the verdict and judgment will be upheld.

No error.

O. E. HATLEY ET AL. v. W. C. HAMMER ET AL.

(Filed 28 March, 1928.)

Trial—Directed Verdict—Directed Verdict Erroneous on Conflicting Evidence.

A directed verdict to an issue is erroneous when the evidence thereon is conflicting.

APPEAL by defendants from *Grady, J.*, at August Term, 1927, of CHATHAM.

Action for the recovery of land and damages for cutting timber. The jury were instructed to answer the first issue "Yes" if they found the facts to be as testified to by all the witnesses. The following verdict was returned:

1. Are the plaintiffs the owners and entitled to the possession of the tract of land described in the complaint? Answer: Yes.

2. If so, have the defendants wrongfully entered upon said lands and cut timber thereon as alleged in the complaint? Answer: Yes.

3. Is the plaintiff's cause of action barred by either of the several statutes of limitations pleaded in the answer? Answer: No.

4. What damages are the plaintiffs entitled to recover of the defendants, if anything, for such wrongful acts? Answer: $120.

Judgment for the plaintiffs and appeal by defendants upon assigned error.

Seawell & McPherson for plaintiffs.
Siler & Barber and W. E. Brock for defendants.

PER CURIAM. On 12 April, 1884, Joseph Riddle and his wife executed a mortgage to John Williams conveying the land in controversy. The mortgage was registered 7 May, 1884, and some time after Christmas, 1889, the land was sold under the power conferred by the mortgagors. J. J. Hatley became the highest bidder, but John Williams took the land and went into possession. There was evidence for the plaintiffs tending to show continuous possession by themselves and those under whom they claim title until 1897, and afterwards in 1901 and 1902. There was other evidence also; but on behalf of the defendants there was at least some evidence in contradiction, the probative force of which was a matter for the jury. Under these circumstances a directed verdict was improper, and for this reason the defendants are entitled to a New trial.

WASH HARRIS v. R. G. LASSITER & COMPANY.

(Filed 4 April, 1928.)

Master and Servant—Master's Liability for Injuries to Servant—Methods of Work.

Evidence tending to show that the plaintiff, an employee of defendant, was injured by a heavy curbing stone slipping from the top of a pile of paving blocks, is insufficient to take the case of actionable negligence to the jury and resist defendant's motion as of nonsuit.

APPEAL by plaintiff from *Barnhill, J.,* at September Term, 1927, of DURHAM. Affirmed.

Action to recover damages for personal injury, sustained by plaintiff, while at work as an employee of defendant, caused, as alleged in the complaint, by the negligence of defendant.

From judgment dismissing the action, as upon nonsuit, at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court.

J. W. Barbee and S. C. Brawley for plaintiff.
Fuller, Reade & Fuller and Parham & Lassiter for defendant.

PER CURIAM. Plaintiff was directed by his foreman to assist other employees of defendant, who were loading on a wagon rock from a pile on a street in the city of Raleigh. The pile of rocks was about 4½ to 5 feet high. It was composed of small paving rock—about the size of a brick. A heavy piece of curbstone was lying on top of the pile. While plaintiff was engaged in his work, the curbstone in some way slipped off the top of the pile, struck plaintiff and crushed his foot. These are all the material facts shown by the evidence.

There was no evidence tending to show a breach of duty on the part of defendant to exercise due care to provide a reasonably safe place for plaintiff to work. In the absence of evidence from which the jury could find that the proximate cause of plaintiff's injury was the negligence of defendant, as alleged in the complaint, there was no error in the judgment dismissing the action as upon nonsuit. The judgment is
Affirmed.

JOHN A. ABEL AND EDWARD C. ABEL, TRADING AS ABEL BROTHERS COMPANY, v. M. DWORSKY AND IDA DWORSKY.

(Filed 4 April, 1928.)

Fraud—Actions—Defenses—Ratification of Fraud.

Held, under the facts of this case, involving the question of fraud in the purchase of a diamond ring, evidence of the ratification of the fraud was sufficient to take the question to the jury.

APPEAL by defendants from *Cranmer, J.*, and a jury, at Second January Term, 1928, of WAKE. New trial.

This is an action for actionable fraud, brought by plaintiffs against defendants.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the ring described in the complaint purchased from the plaintiff by M. Dworsky or by Dworsky's, Inc.? Answer: By M. Dworsky.

"2. Did M. Dworsky obtain the said ring from the plaintiff by fraud? Answer: Yes."

J. C. Little for plaintiff.

J. W. Bailey and W. H. Weatherspoon for defendants.

PER CURIAM. The defendants, at the close of plaintiff's evidence and at the close of all the evidence, made a motion for judgment as in case of nonsuit. C. S., 567.

"It is the well settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Nash v. Royster,* 189 N. C., at p. 410.

This action for fraud is based on the allegations: The purchase of a diamond ring from plaintiffs, doing business in New York, by M. Dworsky (Dworsky's, Inc., doing business in Raleigh, N. C.), for $1,200, with a preconceived intention not to pay for it, he and the corporation he controlled, Dworsky's, Inc., being insolvent at the time, which fact was concealed from plaintiffs, the ring being sold to M. Dworsky for his wife. Three notes of $400 each, signed by Dworsky's, Inc., were given at the time for the diamond instead of the notes being given by M.

Dworsky. We are of the opinion there was sufficient evidence to be submitted to the jury on the issues of fraud. *Des Farges v. Pugh,* 93 N. C., 31; *White v. Products Co.,* 185 N. C., at p. 71; 12 R. C. L., p. 263.

The ring in controversy was delivered to defendant, M. Dworsky, on 12 August, 1925. Dworsky's on 3 September, 1925, wrote plaintiff: "If we do not hear from you within five days we will immediately return all merchandise purchased, and also ask Mr. Rodgers to return his for credit, and you will kindly return our notes."

On 10 September, 1925, plaintiffs wrote to Dworsky's: "We are perfectly satisfied to hold the notes you gave us for the purchase made, and we are not complaining nor questioning your signature. We accepted your three notes signed Dworsky's, Inc., per M. Dworsky, Secretary and Treasurer." There was other evidence tending to show ratification. If plaintiffs discovered the fraud and ratified the sale, they cannot now recover in this action. 12 R. C. L., p. 412; *Darden v. Baker,* 193 N. C., 386. This aspect was not presented to the jury. We think the assignments of error sufficient to present this question. For the reasons given there must be a

New trial.

STATE v. HENRY CHARLES.

(Filed 11 April, 1928.)

Receiving Stolen Goods—Indictment—Evidence—Same Class of Crime.

An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions, does not require the solicitor to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. C. S., 4622.

APPEAL by defendant from *Deal, J.,* at January Term, 1928, of FORSYTH. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

McMichael & McMichael and William Graves for defendant.

PER CURIAM. The three counts in the indictment charge the defendant with having received on 15 December, 1927, certain goods, chattels and moneys, knowing them to have been stolen. He was acquitted on the last two counts and convicted on the first. From the sentence pronounced he appealed, assigning error.

There was evidence that the stolen goods had been delivered to the defendant on different occasions, and for this reason he made a motion to quash the indictment and to require the solicitor to elect as to the count on which he would proceed. Both motions were declined. It will be noted that the defendant is charged with "two or more transactions of the same class of crimes," which were consummated, according to a part of the evidence, in pursuance of a previous agreement between himself and those who committed the larceny; and under these circumstances we find no error in his Honor's ruling. C. S., 4622; *S. v. Malpass,* 189 N. C., 349; *S. v. Jarrett, ibid.,* 516.

The other assignments present no sufficient cause for granting a new trial.

No error.

GUARANTY COMPANY OF MARYLAND v. WACHOVIA BANK AND TRUST COMPANY, RECEIVER OF THE MERCHANTS BANK AND TRUST COMPANY.

(Filed 11 April, 1928.)

APPEAL by defendant from *Lyon, Emergency Judge,* at September Term, 1927, of FORSYTH.

Civil action to establish priority of claim over general creditors.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Fred M. Parrish for plaintiff.

Manly, Hendren & Womble for defendant.

PER CURIAM. This is the same case that was before us at the Spring Term, 1927, *sub nom., Corporation Commission v. Trust Co.,* 193 N. C., 696, 138 S. E., 22, when a partial new trial was ordered. Reference may be had to the case, as first reported, for a full statement of the facts, as well as for the opinion, which has now become the law of the case. *Strunks v. R. R.,* 188 N. C., 567, 125 S. E., 182.

On the second hearing the case seems to have been tried substantially in accord with the principles announced on the first appeal. We perceive no valid reason for disturbing the verdict and judgment.

No error.

WALTER DALTON, BY HIS NEXT FRIEND, MINTORA DALTON, v. THE STONEVILLE CABINET COMPANY.

(Filed 11 April, 1928.)

Master and Servant—Master's Liability for Injury to Servant—Safe Place to Work—Warning and Instructing Servant.

Held, under the facts of this case involving the liability of the defendant in negligently furnishing its minor, an inexperienced employee, an unsafe power-driven machine to do his work, no error in the judgment for damages in the plaintiff's favor.

APPEAL by defendant from *Stack, J.*, at November Term, 1927, of ROCKINGHAM. No error.

This is a civil action, brought by Walter Dalton, by his next friend, Mintora Dalton, against the Stoneville Cabinet Company, to recover damages for personal injuries which the plaintiff is alleged to have received from the use and operation of an alleged defective machine. The action was tried before his Honor, Hunter K. Penn, and a jury, during the August Term, 1927, of the general county court of Rockingham County.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff, Walter Dalton, injured by the negligence of the defendant, as alleged in his complaint? Answer: Yes.

"2. If so, did said plaintiff, by his negligence contribute to his injury, as alleged in the answer? Answer: No.

"3. What damage, if any, is said plaintiff entitled to recover of the defendant? Answer: $400."

An appeal was taken to the Superior Court. The Superior Court sustained the judgment of the general county court. Defendant assigned errors and appealed to the Supreme Court.

Glidewell, Dunn & Gwyn for plaintiff.
J. Hampton Price for defendant.

PER CURIAM. At the close of plaintiff's evidence defendant moved for judgment as in case of nonsuit, C. S., 567, which motion was overruled. There was sufficient evidence to be submitted to the jury. It was in evidence that Walter Dalton, a young and inexperienced lad, 16 years of age, without any warning or instruction as to the hazards, risk and danger, was put to work for the first time on a "sander," in defendant's mill, used in the manufacture of furniture. The sander, it is alleged, was defective. See *Boswell v. Hosiery Mills,* 191 N. C., 549.

Plaintiff's witness, C. H. Brown, testified, in part: "The sander this boy was hurt on was in bad condition. Everything was wrong with it. I can't say how old it was. I didn't see any date on it. The back of the plate was broken. The lever was broken. It was a lever that held the plate down, and it was broken and let the bed plate rise up. The lumber would catch against the edge of the bed plate and hang it. . . . The machine was worn out. It would not do the work well. . . . If the machine was not broken it would not have been possible for this boy to have gotten his finger in between the bed and the plate."

Walter Dalton testified in part: "I think I was 16 years old when this accident happened. When I got hurt I had been working on this machine about an hour and a half. Mr. Null was the boss man who put me on it. He did not give me any instructions as to how to take the lumber off the machine. Nobody told me the machine was broken. I did not know anything about the crack being in there before I got hurt. I had never paid any attention to it, because that was my first job working on there. A boy named Tab Carter was putting the lumber in the other end of the machine. He was putting it in fast. He was putting them in as fast as I could take them out—faster. I was picking them off of the plate and one came out from under the plate and caught this plate and hit my finger and snatched my finger up to the belt that goes over with the notches in it; it hit the plate and caught my finger and snatched my finger in there. . . . It just snatched my hand in there and mashed it up and pulled the nail off." The defendant introduced no evidence.

We have read with care the charge made by the judge of the general county court and sustained by the judge of the Superior Court. It covers every phase of the controversy. It is clear, plain, concise and correct, and covers the law applicable to the facts in every respect. Defendant asked for no prayers for instruction. Some of the assignments of error of defendant do not come up to the requirements. *Rawls v. Lupton,* 193 N. C., 428. If they did, we see no error in them.

No error.

GEORGE L. GLASS AND WIFE, PRINCESS GLASS, v. D. E. MOORE, C. C. MOORE, R. A. MOORE, T. M. MOORE, AND W. P. MOORE, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF D. E. MOORE & SONS.

(Filed 11 April, 1928.)

Process—Service—Return and Proof of Service.

The return of process regularly showing service by the court's appropriate officer cannot be overthrown by the testimony of a single witness.

APPEAL by defendants from *Stack, J.*, at November Term, 1927, of ROCKINGHAM. New trial.

No counsel for plaintiffs.
Glidewell, Dunn & Gwyn for defendants.

PER CURIAM. The only question presented by this appeal: Is the testimony of a single witness sufficient to attack an officer's return of process purporting regular service? We cannot so hold. All the authorities are to the contrary in this jurisdiction. See *Trust Co. v. Nowell, ante,* 449.

For the reasons given there must be a

New trial.

W. C. TISE v. MRS. JENNIE PALMER HICKS ET AL.

(Filed 18 April, 1928.)

APPEAL by plaintiff from *Stack, J.*, at November Term, 1927, of FORSYTH. Affirmed.

This is an appeal from judgment overruling plaintiff's assignments of error based on exceptions taken by him at the trial of the action in Forsyth County Court, and affirming the judgment of said court upon the verdict of a jury. Plaintiff excepted to the judgment and appealed to the Supreme Court.

Fred M. Parrish for plaintiff.
Benbow, Hall & Benbow and W. H. Beckerdite for defendants.

PER CURIAM. An appeal by defendants in this action, from judgment of the Superior Court of Forsyth County, sustaining plaintiff's assignments of error upon his appeal from a judgment of nonsuit rendered at a trial in the Forsyth County Court, and remanding the action to said court for a new trial, was heard in this Court at Spring Term, 1926. The judgment of the Superior Court was affirmed, 191 N. C., 609. The action has been since tried in the county court.

The action is now in this Court, upon plaintiff's appeal from judgment overruling his assignments of error, based upon exceptions taken by him at the trial in the county court, and affirming the judgment, upon the verdict of said court.

The issues of fraud raised by the amended answer of defendants were answered by the jury in accordance with the contentions of defendants.

Plaintiff's assignments of error, based upon his exceptions taken at the trial in the county court were properly overruled. There is, therefore, no error in the judgment of the Superior Court affirming the judgment of the county court. Upon the facts found by the jury, and upon defendant's contentions with respect thereto, which were sustained by the jury, there was no error in holding that defendants were not required to return the money paid to them by the plaintiff, in order to maintain their defense to plaintiff's recovery in this action. It cannot be held that there was no evidence upon which the jury could answer the third issue in the affirmative; there was no error in refusing plaintiff's prayer for instruction with respect to said issue. The judgment is

Affirmed.

H. F. BYRD v. SOUTHERN RAILWAY COMPANY.

(Filed 18 April, 1928.)

APPEAL by plaintiff from *Grady, J.*, at October Term, 1927, of WAYNE. Affirmed.

J. Faison Thomson for plaintiff.
Langston, Allen & Taylor for defendant.

PER CURIAM. The plaintiff, a resident of Duplin County, is a broker engaged in buying and selling vegetables. On 2 June, 1925, he delivered to the defendant for transportation from Goldsboro to the Potomac Yards, Virginia, 494 baskets of beans, consigned to himself. The next day he reconsigned the shipment to Anderson & Johnson, Pittsburgh, Pa., and requested the defendant to divert the shipment to these consignees. Anderson & Johnson, for a valuable consideration, sold, assigned, and transferred all their interest in the claim to U. S. Traffic and Claim Company. Anderson testified that he "withdrew the claim"; but he did not testify that the Traffic and Claim Company had reassigned the claim, and as they had purchased it for value his "withdrawal" could hardly affect their interest.

The plaintiff and Anderson offered to testify that Anderson & Johnson had made a verbal transfer of the claim back to the plaintiff; but for more than one reason this evidence, in our opinion, was properly excluded. So, too, as to evidence tending to contradict the written assignments. The other exceptions to evidence are without merit.

At the close of the evidence the action was dismissed as in case of nonsuit. As the record is presented here, we find no error. Judgment

Affirmed.

W. M. HILTON v. UNITED STATES FIRE INSURANCE COMPANY ET AL.

(Filed 25 April, 1928.)

Appeal and Error—New Trial—Newly Discovered Evidence.

Motion in the Supreme Court for a new trial for newly discovered evidence denied on the grounds of its being merely cumulative and sharply denied.

APPEAL by defendant from *McRae, Special Judge,* at Special October Term, 1927, of UNION. No error.

Action to recover upon policy of fire insurance. Issues submitted to the jury were answered as follows:

1. Was the property of the plaintiff insured by the defendant, United States Fire Insurance Company, as alleged in the complaint? Answer: Yes.
2. Was the hazard of said risk increased by any means within the control or knowledge of plaintiff as alleged in the answer? Answer: No.
3. Were the buildings insured unoccupied beyond a period of ten days preceding the fire? Answer: No.
4. If so, was said insurance in force and effect at the time said property was destroyed by fire as alleged in the complaint? Answer: Yes.
5. What amount, if any, is the plaintiff entitled to recover of the defendant, United States Fire Insurance Company, on said policy? Answer: $500, with interest.

From judgment on the verdict defendant, United States Fire Insurance Company, appealed to the Supreme Court.

W. O. Lemmond and John C. Sikes for plaintiff.
Vann & Millikin for defendant.

PER CURIAM. After the appeal in this action had been docketed in this Court, and after due notice to appellee, appellant moved for a new trial upon the ground of newly discovered evidence. This motion was heard upon affidavits filed by appellant in support of said motion, and by appellee in opposition thereto.

Upon the trial of the action in the Superior Court defendant relied chiefly upon its contention that the third issue should be answered by the jury in the affirmative. The court instructed the jury that there was no evidence in support of this contention, and that they should therefore answer the issue "No." Evidence offered by plaintiff, with respect to the third issue, tended to show that the buildings covered by the policy, and destroyed by fire, were occupied by Will Barnhardt, a tenant of plaintiff, within three or four days prior to the fire. Will Barnhardt did not testify at the trial; he was not present.

Since the trial he has signed an affidavit in which he swears that he moved out of the buildings more than ten days prior to the fire. This is newly discovered evidence upon which appellant relies upon its motion in this Court for a new trial. This affidavit is merely in contradiction of witnesses who testified at the trial. The affidavit itself, while supported by other affidavits, is sharply contradicted by affidavits filed by appellee—among others by the affidavit of Eliza Barnhardt, mother of Will Barnhardt, who swears that she was living near the buildings which were destroyed by fire, and that her son, Will Barnhardt, and his family moved out of said buildings three or four days before the fire.

Appellant's motion is denied upon the principles stated in *Boyd v. Leatherwood,* 165 N. C., 614; *Johnson v. R. R.,* 163 N. C., 431; *Warwick v. Taylor,* 163 N. C., 68, and *Mottu v. Davis,* 153 N. C., 160.

Defendants' assignments of error based upon exceptions taken at the trial and discussed in the brief filed in this Court by its counsel have been considered. They cannot be sustained. The judgment is affirmed.

No error.

J. L. RICE v. FARMERS COTTON GIN COMPANY.

(Filed 25 April, 1928.)

APPEAL by defendant from *Oglesby, J.,* at December Term, 1927, of MOORE. No error.

This was an action brought by plaintiff against defendant for the recovery of the value of a bale of cotton, alleged to be worth $145.80. The allegations of plaintiff are to the effect that he had stored with defendant a quantity of seed-cotton, in the ginnery building of defendant, for the purpose of being ginned and baled when instructed by defendant to do so. This instruction was violated by defendant, the seed-cotton being ginned and baled and placed on defendant's platform.

It was alleged by defendant that the seed-cotton was received by it and ginned in the ordinary course of business and when baled delivered to plaintiff by being placed on the platform with full notice to plaintiff, this being the usual and only place of delivery. The cotton was stolen or lost from the platform.

The issue submitted to the jury and the answer thereto was as follows: "In what amount, if anything, is defendant indebted to plaintiff? Answer: $140.94 without interest."

U. L. Spence for plaintiff.
Hoyle & Hoyle for defendant.

PER CURIAM. From a careful examination of the evidence, we think the evidence was sufficient to be submitted to the jury; the probative force was for them.

No error.

STATE v. DAVE GARLAND.

(Filed 16 May, 1928.)

APPEAL by defendant from *Moore, J.,* at October Term, 1927, of YANCEY.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one Lonnie McMahan on 4 July, 1927.

When the case was called for trial the solicitor announced that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might disclose. The defendant entered a plea of not guilty.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a period of not less than 10 nor more than 15 years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. Hall Johnston and Charles Hutchins for defendant.

PER CURIAM. The record contains a number of exceptions which were the subject of earnest debate before us, and while they are not altogether free from difficulty, a careful perusal of the entire record leaves us with the impression that no reversible error was committed on the trial.

No benefit could be derived from detailing the evidence, as it was sufficient to carry the case to the jury, and the defendant's motion for nonsuit was properly overruled.

There are several expressions in the charge, which, standing alone, might be subject to some criticism, but reading the charge contextually and as a whole, as we are required to do, it would seem to be free from reversible error. The verdict and judgment will be upheld.

No error.

STATE v. LEWIS McCALL ET AL.

(Filed 23 May, 1928.)

APPEAL by defendant, Lewis McCall, from *Moore, J.*, at January Term, 1928, of BUNCOMBE. New trial.

Indictment for larceny. From judgment on a verdict of guilty, defendant, Lewis McCall, appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. A. Sullivan and R. R. Reynolds for defendant.

PER CURIAM. Defendant assigns as error the failure of the court in its charge to the jury to define the crime of larceny, as charged in the indictment, and also to state in a plain and correct manner the evidence given in the case, and to declare and explain the law arising thereon. C. S., 564. Upon a careful examination of the charge as contained in the case on appeal, served by defendant's counsel, and accepted by the Solicitor for the State, we must sustain this assignment of error, on the authority of *S. v. Eunice,* 194 N. C., 409. Defendant is entitled to a

New trial.

M. F. TOMS v. WEAVER MOTOR COMPANY.

(Filed 23 May, 1928.)

APPEAL by defendant from *Moore, J.*, at November Term, 1927, of HENDERSON. No error.

Action for the recovery of an automobile. Judgment was rendered for the plaintiff upon the following issues:

1. Is the plaintiff the owner and entitled to recover the automobile described in the pleadings, subject to any lien that the defendant may have or be entitled to for labor and repairs on the automobile. Answer: Yes.

2. What damage, if any, did the plaintiff sustain by reason of the detention and deterioration of his said automobile? Answer: $400.

3. What amount, if any, is the defendant entitled to recover on his counterclaim for labor and materials furnished? Answer: $50.

Weaver & Patla for appellant.
W. C. Meekins for appellee.

PER CURIAM. The plaintiff's automobile was left with the defendant for repairs. There was a controversy between the parties as to the terms of the contract upon which the repairs were to be made. The jury accepted the plaintiff's contention as to the contract and answered the issues in accordance therewith. We have examined the exceptions of the appellant and find no error. They present no question which requires discussion.

No error.

ROBERT H. BROWN v. PHŒNIX UTILITY COMPANY AND W. O. STANDIFER.

(Filed 23 May, 1928.)

APPEAL by plaintiff from *MacRae, Special Judge,* at April Term, 1928, of CHEROKEE. Affirmed.

Civil action by plaintiff, resident of Cherokee County, to recover of the nonresident defendant corporation, Phœnix Utility Company, and the resident defendant, W. O. Standifer, damages in the sum of $30,000 for an alleged negligent injury, sustained on or about 12 July, 1927, while working on a construction project or hydro-electric dam in Haywood County.

The Phœnix Utility Company in apt time filed its duly verified petition, accompanied by proper bond, and asked that the cause be removed to the District Court of the United States for the Western District of North Carolina for trial, which request was granted.

Plaintiff appeals, assigning error.

D. H. Tillett and A. Hall Johnston for plaintiff.
Don Witherspoon and Harkins & VanWinkle for defendant, Phœnix Utility Company.

PER CURIAM. A careful perusal of the record leaves us with the impression that the order of removal should be upheld on authority of *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254. The principles announced in *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238, cited by plaintiff, are also in support of his Honor's ruling.

Affirmed.

HATTIE LEE STEVENS, BY HER NEXT FRIEND, T. C. STEVENS, v. DR. G. W. KUTSCHER, JR.

(Filed 6 June, 1928.)

APPEAL by defendant from *Walter E. Moore, J.,* at February Term, 1928, of BUNCOMBE. No error.

The action is to recover damages for alleged injuries to the plaintiff, a minor, because of the alleged negligence of defendant in knocking out some teeth while performing an operation for tonsillitis."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff, Hattie Lee Stevens, injured by the negligence and carelessness of the defendant, as alleged in the complaint? Answer: Yes.

"2. What damage, if any, is the plaintiff entitled to recover? Answer: $3,000."

A. Hall Johnston for plaintiff.
Merrimon, Adams & Adams and Pless & Pless for defendant.

PER CURIAM. We have read with care the record, briefs of plaintiff and defendant, and the charge of the court below. We have considered the assignments of error. Upon the whole record we can find no prejudicial or reversible error.

No error.

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A Accepting Check in Settlement of Disputed Debt is Binding.

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ACCOUNT, Action on.

A Rights of Creditor.

a Application of Payment

1. A debtor owing two or more debts to the same creditor may direct when payment is made that payment be applied to a certain one of them, and upon his failure to do so, the creditor may apply it; and when neither has done so the law will apply it to an unsecured debt, or the one for which the security is most precarious, or according to an equitable view of intrinsic justice under the facts of the case. *Supply Co. v. Plumbing Co.*, 629.

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a Real Controversy

1. To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. *Wood v. Hughes*, 185.

b Wrongful Act

1. Damages for an injury are awarded only when they are caused by a wrongful act done to the complaining party. *Cherry v. Gilliam*, 233.

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ADVERSE POSSESSION.

A What Constitutes Color of Title.

1. As to whether a deed is champertous which conveys to the grantor's son certain described lands, reserving to the grantor and his wife a life estate, given in consideration of the grantee's successfully maintaining a suit to clear the title to the lands conveyed, *quere?* and, *Held*, the deed is sufficient color of title after registration and after the falling in of the reserved life estate, to ripen the title in the grantee after seven years adverse possession of the land, held openly and notoriously and under known and visible metes and bounds. *Ennis v. Ennis*, 320.

B Against Unincorporated Town.

1. When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them has been shown, for thirty-five years for a period of time prior to the enactment of chapter 224, Public Laws 1891; C. S., 435, the right of the town to the use of the street is barred by the statute of limitations. *Tadlock v. Mizell*, 473.

C Nature and Requisites.

1. Adverse possession sufficient to ripen title is the exclusive use of the claimant for twenty years, continuously taking the exclusive benefits such as the land in question is capable of yielding, under known and visible metes and bounds. C. S., 430. *Johnson v. Fry*, 832.

D Claimant Not Required to Show Title out of State.

1. It is not required that the plaintiff in an action to recover lands by twenty years adverse possession, C. S., 430, should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. C. S., 426. *Johnson v. Fry*, 832.

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A Review.

a Scope and Extent of Review and Questions Reviewable

1. When in an appeal the Supreme Court has decided that a defendant life insurance company deliver to the plaintiff a certain kind of its policies as of a certain date, and the former in its motion as for contempt of court, contends that the defendant had not complied with the court's opinion in delivering the kind of policy designated, the judgment of the lower court will be reviewed which ordered judgment upholding plaintiff's motion in direct conflict with all the evidence introduced upon the hearing. *Rosenberg v. Assurance Society*, 3.

APPEAL AND ERROR—*Continued.*

2. The facts found upon supporting evidence and approved by the trial judge, and also the facts likewise found by him, are not reviewable in the Supreme Court. *Pickler v. Pinecrest Manor*, 614.

b Burden of Showing Error

1. While on appeal from proceedings in injunction the Supreme Court may review the evidence upon which the lower court has based its findings of fact, the burden is on the appellant to show error, with the presumption in favor of the judgment appealed from. *Road Comrs. v. Highway Commission*, 26.

2. *Held*, that the facts found by the lower court that the consolidation of two contiguous public school districts was made by the county board of education was under the provisions of 3 C. S., 5481, are supported by the evidence, and though the evidence is reviewable by the Supreme Court on appeal, the findings and conclusions of law thereon are presumed correct, and the burden is on the appellant to show error. *Parker v. Debnam*, 56.

3. The burden is on the appellant to show error in the Supreme Court, and when none is made to appear the judgment rendered in the Superior Court in appellee's favor will be affirmed. *Newberry v. Willis*, 302.

c Review of Questions not Raised in Lower Court

1. Where the caveat to a will is duly filed and the trial regularly had upon the sole theory that the testator did not have mental capacity to make it, on appeal the caveator may not successfully contend that it was invalid for undue influence brought to bear upon the testator, and that therefore it was not in fact his will, but that of another. *In re Will of Efird*, 76.

d Rules of Court—Prosecution of Appeal—Briefs—Assignment of Error—Docketing (in Criminal Cases see Criminal Law F a).

1. An appeal from a judgment of nonsuit will be dismissed when the appellant has assigned no error or filed no brief. *Furlough v. Highway Commission*, 366.

2. The question of whether the lower court was in error in issuing orders for the appointment of a receiver for a statutory drainage district arises on appeal to the Supreme Court upon exceptions duly taken, and objections to the regularity thereof as not being entered in the course and practice of the court must be by motion in the cause. *Broadhurst v. Drainage Comrs.*, 439.

3. The rules of the Supreme Court regulating the prosecution of appeals are mandatory, and must be equally observed, or the case will be dismissed. Apply *Estes v. Rash*, 170 N. C., 341, as to requirements of appellant in *forma pauperis*. *Covington v. Hosiery Mills*, 478.

4. Where the appellant has failed to have his case docketed in time under Rule 5 of the Supreme Court (192 N. C., 841), in order to preserve his appeal it is required that he file an application for a *certiorari*, addressed to the discretion of the Supreme Court, and show a good and sufficient reason for the granting of his motion therefor; and the mere fact that the term of Superior Court ex-

APPEAL AND ERROR—*Continued.*

tended beyond the time of the convening of the Supreme Court does not prevent the case from being docketed and heard at that term, the time of the judgment appealed from being considered under the provisions of our statute as the first day of the term at which it was tried. C. S., 613. *Pentuff v. Park*, 609.

5. It is necessary that exceptions be mentioned in brief, with authorities and argument, or they will be deemed abandoned on appeal. *Ludford v. Combs*, 851.

6. The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of Court regulating appeals. *Bridgers v. Griffin*, 862.

e Record Conclusive on Review

1. The appellant may not insist in the Supreme Court that error had been committed by the trial court upon a state of facts contrary to the record. *Mfg. Co. v. Kornegay*, 373.

2. A question not presented on record of a former decision will not be considered in the Supreme Court on a motion to rehear the case. *Comrs. of McDowell v. Assell*, 719.

3. The charge of the court to the jury will be presumed as correct on appeal when it is not set out in the record. *Ogle v. R. R.*, 795.

B Remand (in Action to Set Aside Judgment see Judgments E a 2).

a In Mandamus Proceedings Against Private Corporation

1. When proceedings in mandamus have been instituted by stockholders of a private corporation to compel the distribution of a surplus ascertained in accordance with the provisions of C. S., 1178, before the judge holding the terms of court of the district, C. S., 868, and the judge has issued a mandamus to compel the payment of the dividends without evidence of the actual cash value of the assets or taking into his consideration a proper deduction for the depreciation of the plant, the case will be remanded to him to be proceeded with according to law. *Cannon v. Mills Co.*, 119.

b For Proper Judgment

1. Where the plaintiff is entitled to judgment in an action arising on contract, wherein the defendant sets up a counterclaim that cannot be maintained, and each is given judgment against the other, respectively, the case will be remanded for a proper judgment to be rendered in the lower court. *Seed Co. v. Jennette Bros.*, 173.

2. Where the trial judge erroneously enters judgment *non obstante veredicto* and refuses to grant defendant's motion of nonsuit, on appeal the judgment will be reversed and a new trial ordered. *Jernigan v. Neighbors*, 231.

C Disposition After Remand.

a Proceedings in Lower Court

1. When a case is remanded to the end that evidence to a certain finding of fact by the judge be made to appear in the record, and the opinion of the court is complete, the trial judge is confined to the particular point, and his inclusion of extrinsic matter will be disregarded. *London v. Comrs. of Yancey*, 10.

APPEAL AND ERROR—*Continued.*

2. A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Moses v. Town of Morganton*, 92.

D New Trial (for Conflicting Instructions see Trial A d 1).

a Parties Entitled for Erroneous Instructions

1. Where two defendants are sued for a joint tort, and an erroneous instruction has been given as to the liabilities of one, materially prejudicing the other under the evidence in the case, on appeal a new trial will be granted as to both. *May, Admr., v. Grove*, 236.

b For Newly Discovered Evidence

1. Motion in the Supreme Court for a new trial for newly discovered evidence denied on the grounds of its being merely cumulative and sharply denied. *Hilton v. Ins. Co.*, 874.

E Nature and Grounds of Appellate Jurisdiction.

a Motion for New Parties Not Allowed in Supreme Court

1. Where an order sustaining defendant's demurrer to the complaint is reversed on appeal, plaintiff's motion for new parties to be made to the action will not be allowed in the Supreme Court, but the plaintiff will not be prejudiced in his right to make the motion in the Superior Court. *Reel, Admx., v. Boyd*, 273.

b Appeal from Interlocutory Order

1. An appeal from the adverse ruling of the trial judge on a motion to strike out exceptions to a referee's report, made by the party on whose motion the reference was made, is from an interlocutory order and premature, and will be dismissed on appeal. *Contracting Co. v. Power Co.*, 649.

F Requisites and Proceedings for Appeal.

a Service of Case on Appeal

1. An order made without notice to the parties by the judge beyond the term of the court and outside of the district, extending the time for the service of case on appeal is void. *S. v. Crowder*, 335.

APPEARANCE.

A What Constitutes General Appearance.

1. Where attachment proceedings in an action against nonresident defendants have been made against their property situate in this State in order to confer jurisdiction on our court, and the defendant has moved here for setting aside a judgment against him for surprise, mistake, excusable neglect, etc., it is a general appearance in our courts, and a submission to their jurisdiction, and a waiver of service of summons, and a judgment rendered in the action against them is not restricted to a judgment *in rem*, but is also one *in personam*. *Abbitt v. Gregory*, 203.

2. An appearance for the purpose of filing a demurrer to the complaint is a general appearance to its merits and confers jurisdiction by waiving a proper service of summons. C. S., 490. *Reel, Admx., v. Boyd*, 273.

APPEARANCE—*Continued.*

3. The giving of a replevy bond is equivalent to a general appearance entered by a defendant in attachment, and is a waiver of the irregularities, if any, in the service of summons, or the necessity of such service, and estops the defendant from denying ownership of the property levied on. *Bizzell v. Mitchell*, 484.

ARBITRATION AND AWARD.

A Right to Arbitration.

a Right to Arbitration May Be Waived

1. As to whether a clause in a building contract providing for an arbitration is enforceable as a condition upon which one of the parties may maintain an action on the contract, *Quere?* but this is a matter that the parties may waive. *Pickler v. Pinecrest Manor*, 614.

b Trial Court has no Discretion to Change Terms of Award Where Parties Agree Award be Final

1. Where an action upon a money demand has been referred to arbitrators under agreement that their report be final and binding, and the final judgment of court, the award to the plaintiff of a certain amount and interest, together with the costs of the action, excludes any discretion of the trial judge in taxing the plaintiff with fees for the services of the arbitrators and stenographer. *Transportation Co. v. Stearns*, 720.

ARREST see Escape.

ARSON.

A Evidence.

a Evidence of Other Burnings

1. On trial under indictment for burning a barn to collect fire insurance thereon, C. S., 4242, evidence that the defendant at another place, at some indefinite time in the past, had another barn to burn, is incompetent and does not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, and not a part of the same transaction. *S. v. Deadmon*, 705.

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ASSIGNMENTS.

A Rights and Liabilities of Parties.

a Rights of Prior Assignee

1. While a bank may make a valid transfer of certain of its assets to secure the officers thereof in signing as sureties an undertaking given by the bank for the deposit of county funds (*Trust Co. v. Rose*, 192 N. C., 673), such transfer will not prevail as against an equity of a third person to whom the same assets had been pre-

ASSIGNMENTS—*Continued.*

viously assigned and the later assignment was in fraud of rights acquired, and where these matters are sufficiently alleged a demurrer thereto is bad. *Richmond County v. Trust Co.*, 545.

2. In the course of its dealings and for a lawful purpose a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by 3 C. S., 220(a); and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail. *Ibid.*

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ATTACHMENT.

A Grounds for Attachment.

a Defendant Does Not Admit Ground of Attachment by Filing Replevy Bond

1. By filing a replevy bond for the retention of his property the defendant in attachment does not admit the allegation of fraudulent concealment or other such statutory grounds upon which the attachment was issued. C. S., 814, 815. *Bizzell v. Mitchell*, 484.

B Liabilities on Bonds and Undertakings.

a Liability on Replevy Bonds

1. When the defendant in attachment enters a general appearance and traverses the allegations of fraudulent concealment of his property upon which the attachment was based, and gives a replevin bond to retain the possession of the property attached, with the required surety, and upon the trial the issue as to fraud is found in his favor, the surety on the replevy bond is discharged from liability, and it is not necessary that a motion to vacate the attachment be previously made. *Bizzell v. Mitchell*, 484.

2. Judgment against a surety on a replevy bond in attachment cannot be ordered in the main action unless he has made himself a voluntary party therein, the ordinary remedy being by separate action against him. *Ibid.*

ATTORNEY AND CLIENT (Argument and Conduct of Counsel see Trial E).

A Offices of Attorney.

a Duties and Privileges

1. An attorney at law is an officer of the court in the sense that he owes a duty to the public, as well as to his client, and the manner of his exercise of his right to practice is subject to the court's supervisory power. *Waddell v. Aycock*, 268.

B Fees.

a Fees as Part of Cost

1. Attorney's fees and the personal expenses of an attorney in the litigation is not an element of damages recoverable by the plaintiff in his suit to set aside a conveyance of land for fraud. *Parker v. Realty Co.*, 644.

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A Directors.

a Liability of Individual Endorser of Note Not Affected by Office

1. Where it appears that sureties on a bond given by a bank to secure a depositor are directors of the bank, but that they signed in their individual capacity, their measure of liability is not increased by reason of their being directors of the principal obligor. *Ingram v. Bank*, 357.

b Only Depositors May Sue Officers and Directors for Wrongfully Receiving Deposits

1. While a demurrer to the complaint of a receiver of a defunct bank is bad in this case: *Held*, the depositors alone may sue to recover upon allegations of the wrongful receipt of their deposits, and such allegations on proper motion will be stricken from the complaint in the receiver's action. *Trust Co. v. Peirce*, 717.

BEQUESTS see Wills.

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BILLS AND NOTES (Liability of Bank Directors on Note see Banks and Banking A a).

A Checks (Liability of Bank Refusing Payment of Check see Libel and Slander D a 2—Check Given for Gambling Debt see Gambling).

a Rights and Liabilities of Drawer, Drawee, Payee, and Banks in Course of Collection

1. When a collecting bank receives a check for collection payable at a bank in another town, there is no authority of agency conferred by the drawer of the check on it to receive in payment anything but money; and where the drawer of the check has money to meet the check on deposit in the drawee bank, on presentment in due course, and an intervening bank, in the course of collection, receives a check of the drawee bank in payment, which is not paid by reason of the drawee bank becoming insolvent before presentment of its check: *Held*, as a matter of law the drawer of the check is released from liability thereon. 3 C. S., 220(n), has no application to the facts in this case. *Dewey v. Margolis*, 307; *Quarles v. Taylor*, 313.

2. When a check on a bank by the drawer has not been paid upon presentment at the drawee bank in due course, by reason of insufficient funds, the payee may elect to bring action upon the unpaid check or upon the obligation for which the check was given. *Ibid.*

3. When a bank receives a check from its depositor for collection which is paid by the drawee, and the bank through which it has been paid in due course of collection and remittance has charged the amount to the account of the initial bank, which has since become insolvent, the agency for collection ceases upon the payment of the check and its acquisition by the bank to whom the initial bank had forwarded

BILLS AND NOTES—*Continued.*

it, it thus becoming a purchaser for value in due course, without notice of any infirmity in the instrument, and the depositor under her unrestricted endorsement has recourse only against the bank in which she had thus deposited the check. STACY, C. J., dissenting on the ground that a judgment as of nonsuit should not have been entered under the facts of this case. *Arnold v. Trust Co.*, 345.

b Checks as Evidence of Payment. (On Motion of Nonsuit see Trial B d 1.)

1. A check marked paid by the drawee bank in the hands of the drawer thereof is only prima facie evidence of payment, and may be rebutted by showing that payment had not in fact been made. *Dewey v. Margolis*, 307; *Quarles v. Taylor*, 313.

2. Where in a taxpayer's suit to enjoin the sale of his land for the nonpayment of taxes he introduces evidence tending to show that a check given and accepted therefor was returned to him by the payer bank, which that day became insolvent, marked "paid," and other evidence was introduced tending to show that notwithstanding this the check was in fact not paid, and there was no evidence as to by whom the check was presented nor mode of payment: *Held*, the evidence is sufficient to be submitted to the jury. *Litchfield v. Reid, Sheriff*, 161.

3. Where a check passes through several banks in the course of collection "pay to any bank or order," and is marked paid by the drawee bank, and returned to the maker, there is at least a presumable inference of fact that it was paid in money to some bank as the holder thereof. *Ibid.*

B Fraud as Affecting Bills and Notes.

a Fraud in the Factum, Fraud in the Treaty

1. Where in an action upon a note the defendant pleads and introduces evidence tending to show fraud in the treaty and acknowledges that he signed it, and the plaintiff claims as a purchaser in due course for value without notice, with evidence to support it, the plaintiff is entitled to recover upon the evidence in the absence of competent evidence tending to show that he had notice of the infirmity of the instrument at the time he had acquired it. *Finance Co. v. Mills*, 337.

2. A negotiable instrument procured by fraud in the treaty is voidable between the original parties and binding in the hands of innocent third parties, and one procured by fraud in the factum is absolutely void. *Ibid.*

C Actions.

a Issues

1. When the endorsers on a note plead two separate and distinct defenses to their liability to the action, with evidence to support them, and the trial judge has submitted issues upon each of them, one upon want of notice of presentment and dishonor to them as accommodation indorsers, it is reversible error for the trial judge to withdraw this issue, upon which the defense largely depends,

BILLS AND NOTES—*Continued.*

from the jury and leave the jury uninstructed as to the law thereon, and submit the case upon the other issue alone. *McNeill v. McGirt*, 370.

D Notes in Series (Limitation of Foreclosure of Mortgage Securing Notes in Series see Mortgages C a).

a Option of Acceleration

1. Where notes are given in series, providing that upon the nonpayment at maturity of each as they become due all of them are to become due and payable, it is at the option of the holder to enforce acceleration, and when he has not exercised his option, it will be presumed that he has waived his right to do so. *Meadows Co. v. Bryan*, 398.

BONDS—Municipal Bonds see Taxation B a—of Clerks see Clerks of Court B—of Sanitary Districts see Sanitary Districts B—Indemnity Bonds see Principal and Surety—for Municipal Construction see Principal and Surety, A b, A d.

BOUNDARIES see Deeds and Conveyances C.

BUILDING AND LOAN ASSOCIATIONS (Bankruptcy of, see State A a 6).

A Duties and Liabilities of Officers.

1. Where the directors of a building and loan association are negligent of their duties and leave the management of its affairs in the hands of its secretary-treasurer, who, by maturing the stock at an earlier date than was safe, caused the association to become insolvent and finally to be placed in the hands of a receiver, and by other acts of mismanagement tending to the same result, and the directors by the observance of their duties should have been aware of the conditions existing: *Held*, a cause of action arises to the receiver upon a joint tort, in behalf of the stockholders and creditors of the corporation. *Braswell v. Morrow*, 127.

B Relationship of Borrower and Stockholder.

1. Where the borrower from a building and loan association takes out stock, to pay at maturity the debt secured by a mortgage on his building, he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the association; that of stockholder, and that of debtor to the association, and he is not entitled to have his payments made on his shares of stock credited to his debt, as against the claims of the other creditors. C. S., 5180, 5183. *Rendleman v. Stoessel*, 640.

BURDEN OF PROOF see Evidence B—in Particular Actions see Particular Heads.

BUS LINES (Liability of Surety on Bonds of Bus Lines see Principal and Surety A c.)

A Actions for Negligence.

a Parties. (Constitutionality of Statute Relating to Parties see Constitutional Law B a 2.)

1. Under the provisions of the statute of 1925, ch. 50, secs. 3, 6(g), requiring public-service bus lines to give bonds indemnifying passen-

BUS LINES—*Continued.*

gers and the public against negligent injury and property loss, as amended by Public Laws of 1927, ch. 136, sec. 6, providing that "in any action in the courts arising out of damage to person or property, the assurer shall not be joined in an action against the assured, but the assurer shall be liable within the limits of the bond," etc.: *Held*, a joinder of the assurer in the action is forbidden, and the complaint will be dismissed upon demurrer. *Williams v. Motor Lines*, 682.

CANONS OF DESCENT see Descent and Distribution.

CARRIERS.

A Carriage of Goods.

a Liability for Loss or Injury to Goods

1. Under the Carmack Amendment to the U. S. statute, a carrier is liable to the lawful holder of a receipt or bill of lading in interstate commerce, or to any party entitled to recover thereon, for the full, actual loss or damage to the shipment, and in the consignor's action to recover for a shipment destroyed while in the carrier's possession, and it also appears in the complaint that the plaintiff had given the initial carrier notice of the loss, a demurrer on the ground that the consignee had been made a party plaintiff and that the title to the shipment vested in him upon the consignor's receiving the bill of lading, and that it is not alleged that the latter had also given the required notice to the carrier, is bad; and as to whether such notice is required under a uniform bill of lading is not presented on the appeal of defendant from judgment overruling the demurrer. *Furniture Co. v. R. R.*, 636.

CAUSES OF ACTION—Demurrer Thereto see Pleadings A a.

CAVEAT see Wills D.

CERTIORARI (see Appeal and Error A d 4).

A Nature and Grounds.

1. When the case of the appellant cannot be made out and served in time to bring it up to the Supreme Court and docketed within its rules, for reasons for which he is not responsible, it is required that he should apply to the Supreme Court, then in session, for a writ of *certiorari* in apt time, and when he has depended solely upon a void order of the trial judge extending the time for the service of his case, which is excepted to, the case will be dismissed. *S. v. Crowder*, 335.

CHALLENGES TO JURY see Jury.

CHARACTER EVIDENCE see Evidence A a—In Criminal Actions see Criminal Law A b.

CHARITABLE INSTITUTIONS—Designation as Devisees see Wills E d—Appointment of Trustee for Charitable Trust see Trusts B a—Taxation of see Taxation C a.

CHECKS see Bills and Notes A.

CITIES see Municipal Corporations.

CIVIL PROCEDURE—Vested Rights Therein see Constitutional Law B a—Construction of Statutes Relating Thereto see Statutes A b—Procedure in Particular Actions see Particular Heads.

CLAIMS AGAINST THE STATE see State B—Jurisdiction of, see Courts A.

CLERKS OF COURT (Power to Extend Time for Filing Pleadings see Pleadings C b—Appointment of Administrators see Executors and Administrators B a).

A Jurisdiction.

a Judgments by Default Final and Default and Inquiry

1. The clerk of the Superior Court has jurisdiction to enter such judgments by default final and by default and inquiry as are authorized by statute. C. S., 595, 596, 597; 3 C. S., 593. *Baker v. Corey*, 299.

b Power to Change Venue

1. The clerk of the Superior Court has the right to order an action transferred to another county only when a defendant is entitled thereto as a matter of right, and not when it is a matter of discretion; in the latter case it is to be exercised by the judge of the Superior Court upon motion properly made in term. *Causey v. Morris*, 352.

B Liability on Official Bond.

1. The surety on the official bond of the clerk of the Superior Court for defalcation of moneys he has received in his official capacity is liable only to the extent of such misappropriation for the term covered by the bond, and to the extent of the penalty therein, and this principle applies when the same surety is on several successive bonds of the same clerk, given upon his successive election to and induction into this office. *Gilmore v. Walker*, 460.

2. When a defaulting clerk of the Superior Court has several times succeeded himself in that office, and has given his several bonds with the same surety for the several terms of such office, in the absence of evidence to the contrary, the presumption is that he defaulted as to the various amounts he has received at the various times they were paid to him, with the burden upon the surety upon the bond, and the personal representative of the deceased clerk, to show to the contrary. *Ibid.*

3. The provisions of C. S., 956, requiring an annual report of the condition of his office by the clerk of the Superior Court to the county commissioners raises a prima facie case of its correctness only when the statute is substantially complied with, so that the report show an itemized statement of the funds held, the date and source from which they were received, the persons to whom due, how invested, and where, and in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of the investment of said fund; so that the report may accordingly be audited, and published in accordance with C. S., 957. *Ibid.*

CLERKS OF COURT—*Continued.*

4. Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the Superior Court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. *Ibid.*

CODICILS see Wills E c 1.

COLOR OF TITLE see Adverse Possession A.

COMPLAINT see Pleadings D—in Particular Actions see Particular Heads.

CONDITIONAL SALES see Sales A.

CONFESSIONS see Criminal Law A c.

CONSOLIDATED STATUTES (Statutes see Statutes).
(For convenience in annotating statutes.)

SEC.

1. Clerk of court alone has power to appoint administrator. *Bank v. Comrs. of Yancey*, 678.

139 (4), (5), 140. Illegitimate child may not inherit from maternal grandfather, 188.

185. Adopted child does not take under deed to the children born of his mother. *Tankersley v. Davis*, 542.

220 (a), Vol. 3. When bank transfers security to more than one person, first in time prevails. *Richmond County v. Trust Co.*, 545.

220(n), Vol. 3. No application where drawer of check has money in payee bank. *Dewey v. Margolis*, 307.

224(e), 4401. Evidence sufficient to sustain charge of embezzlement by officer of bank. *S. v. Maslin*, 537.

279. Bastard's right to inherit from putative father who afterwards marries his mother. *Stewart v. Stewart*, 476.

415. Whether action is continuance of former action is question of law, and parol evidence not admissible on point. *Motsinger v. Hauser*, 483.

426, 428, 430. When title to lands presumed to be out of the State—Instructions. *Dill Corporation v. Downs*, 189; *Johnson v. Fry*, 832.

428, 3309. Not applying, section 614, *post*. *Johnson v. Fry*, 832.

430. Character of adverse possession to ripen title to lands. *Johnson v. Fry*, 832.

435. When right of town to use of street barred by statute of limitations. *Tadlock v. Mizzell*, 473.

437(3). Default in payment of one note in series where all were to become due and payable upon default does not start the running of the statute of limitations where creditor does not exercise option of acceleration. *Meadows Co. v. Bryan*, 398.

CONSOLIDATED STATUTES—*Continued.*

SEC.

445. When plaintiff is estopped by his laches to claim title to his mother's separate realty against children of his mother's second marriage. *Marshall v. Hammock*, 498.

456, 507, 534, 519, 521, 522, 445, 1667. One who has supported wife and children of an abandoning husband may offset sum so paid against rents and profits of land in action by husband to recover them from him. *Jeffreys v. Hocutt*, 339.

463(1). When action is only on note secured by mortgage it is not one involving interest in realty, and is not removable as a matter of legal right. *Causey v. Morris*, 532.

469. Where under section 463(1) cause is not removable as matter of legal right, plaintiff may select venue. *Causey v. Morris*, 532.

469. Venue of action of nonresident plaintiff and resident defendant. *Brown v. Auto Co.*, 647.

470(2). Discretion of court on motion to remove cause to another county not reviewable. *Causey v. Morris*, 532.

490. Demurrer to complaint is general appearance waiving service of summons. *Reel v. Boyd*, 273.

502. Torrens proceedings is *lis pendens*. *Brinson v. Lacy*, 394.

505, Vol. 3, 536. Court may extend the time to plead from time to time in unbroken sequence. *Hines v. Lucas*, 376.

512. Pleadings liberally construed to deny demurrer. *Enloe v. Ragle*, 38.

513, Vol. 3. Demurrer to complaint sustained. *Ballinger v. Thomas*, 517.

519, 521, 522. Slander of title a cross-action in action to recover mineral interests—Demurrer—Equity. *Thompson v. Buchanan*, 155.

536, 600. Superior Court judge on appeal may set aside judgment rendered by default by clerk upon proper additional findings—Pleadings—Amendments. *Dunn v. Jones*, 354.

536, 637. Power of Superior Court judge to allow amendments to pleadings, etc., not abridged. *Mfg. Co. v. Kornegay*, 373.

547. Changing name of administratrix to correct error does not constitute new action, and is not reversible error. *Hill v. R. R.*, 605.

547. Amendment asking damages not a change of cause of action. *Parker v. Realty Co.*, 644.

564. Instruction held not expression of opinion. *S. v. Boswell*, 496.

567. How evidence considered on motion of nonsuit. *New Bern v. Tel. Co.*, 285.

578, 579. Party asking for reference not bound by report, and may except. *Contracting Co. v. Power Co.*, 649.

593, 594, 596, 597. When amount in suit not definitely determined from complaint judgment by default final is improper. *Supply Co. v. Lumber Co.*, 629.

CONSOLIDATED STATUTES—*Continued.*

SEC.

595, 596, 597, 593, Vol. 3. Judgment by default may be entered by clerk of court. *Baker v. Corey*, 299.

600. When cause is removed by clerk from State Court to Federal Court, and therein sent back, a judgment in the State Court by default, entered in the meanwhile, may be set aside on motion showing meritorious defense. *Abbitt v. Gregory*, 203.

613. Applicant must file motion for *certiorari* in Supreme Court and show absence of laches when appeal not docketed in time required by rule. *Pentuff v. Park*, 609.

614. When prior lien of judgment has preference over later mortgage in foreclosure. *Duplin County v. Harrell*, 445.

614. Whether unregistered deed is color of title not issue when title by twenty years adverse possession is shown. *Johnson v. Fry*, 832.

728, 729, 730, 731, 745. Homestead must be allotted in equity of redemption. *Clark v. Walden*, 752.

729. Homesteader loses his right by conveyance of lands, but has right to select in other of his lands. *Duplin County v. Harrell*, 445.

799(2). Upon establishing issue in favor of debtor surety on replevy bond is released. *Bizzell v. Mitchell*, 484.

814, 815. Replevy bond does not admit fraud, etc. *Bizzell v. Mitchell*, 484.

858, Vol. 3 (a). Supplemental order providing for payment of teachers is held proper in this case. *Clark v. McQueen*, 714.

868. When case remanded in Supreme Court for further facts. *Cannon v. Mills Co.*, 119.

913, Vol. 3 (a). When case not removable, 463(1), 469, cause tried *de novo*. *Causey v. Morris*, 532.

913, Vol. 3 (b). Clerk's order to remove cause under Federal Statutes for diversity of citizenship when erroneous is not void. *Abbitt v. Gregory*, 203.

921. Evidence necessary to attack summons duly served by process officer. *Trust Co. v. Nowell*, 449.

956, 957. Presumption of correctness of report of clerk of court. *Gilmore v. Walker*, 460.

1005. Corporation not merged with another when retaining property sufficient to pay debts. *Askew v. Hotel Co.*, 456.

1009. Son entitled to moneys spent in good faith under contract with his father to support him, when done for sufficient consideration. *Bank v. Mackorell*, 741.

1178, 1179. Surplus for dividends when and how declared. *Cannon v. Mills Co.*, 119.

1421. Power of Supreme Court to review. *Lacy v. State*, 284.

1500. Indictment before justice of peace amended on appeal. *S. v. Holt*, 241.

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1500 (Rule 15). When criminal action terminated to allow action for malicious prosecution. *Winkler v. Blowing Rock Lines,* 673.

1662. Judgment must accord with verdict in action for divorce. *Saunderson v. Saunderson,* 169.

1724. By preserving right, the owner of lands in condemnation proceedings has right to trial by jury as to amount of damages. *Ayden v. Lancaster,* 297.

1744, 1745. A devise of profits from rents of a store building to designated children is enforceable when one of them is not *in esse,* and the others are properly represented by guardian. *Waddell v. Cigar Stores,* 434.

1750. Certificate of mayor of town of existence of ordinance is prima facie case of its existence. *S. v. Gill,* 425.

1790. Remainders upon contingent interests in rent of lands evidently falling due within the life of a trust are enforceable by trustee designated in will. *Waddell v. Cigar Stores,* 434.

1798. Opinion of physician, made under court order, as to mentality of one accused of crime not confidential or excluded. *S. v. Newsome,* 552.

2307. When interest is computed from date of verdict. *Ludford v. Combs,* 851.

2309. Real estate agent entitled to interest from date when commission is due and payable. *Thomas v. Realty Co.,* 591.

2331, 2332. Decision of trial judge final as to allowance of challenges in joint negligence case. *Ramsey v. Power Co.,* 789.

2343. Provision for benefit of lessor. *Monger v. Lutterloh,* 274.

2343, 2372. Receiver of one holding lease on theatre entitled to continue to operate lease under certain conditions. *Coleman v. Carolina Theatres,* 607.

2378. Proceedings under Torrens law are *lis pendens. Brinson v. Lacy,* 394.

2445. Under statutory amendments surety on contractor's bond for municipal building only liable to materialmen in amount fixed by bond. *Supply Co. v. Plumbing Co.,* 629.

2480. Landlord's lien on crops for rent extended by statutory amendment. *Brooks v. Garrett,* 452.

2563(6). Sale of cafe with provision that seller not engage in that business in that locality for five years valid and not in restraint of trade. *Hill v. Davenport,* 271.

2589. When barred by statute of limitations sale of foreclosure under mortgage may not be made against rights of creditor. *Meadows Co. v. Bryan,* 398.

2591. Bidder at foreclosure sale acquires no rights until after expiration of ten days. *Cherry v. Gilliam,* 233.

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2707. Street assessment for improving only one side of street is not void. *Waxhaw v. R. R.*, 550.

2787 (11). A municipal corporation giving license to beg within lawful police power, and is not discriminatory. *S. v. Hundley*, 377.

3215, 3233. Whether lands capable of actual division without injury to tenants in common is issue of fact for judge. Trust created by one tenant does not defeat right of other to partition. *Barber v. Barber*, 711.

3311, 3312. Registration of instrument necessary as against creditors represented by receiver of corporation. *Acceptance Corp. v. Mayberry*, 508; *Mfg. Co. v. Price*, 602.

3411, Vol. 3 (j). Defendant must prove exception under provisions of section. *S. v. Dowell*, 523.

4023. Court may appoint trustee to execute a charitable trust. *Benevolent Society v. Orrell*, 405.

4145. Will probated in common form cannot be attacked collaterally. *Mills v. Mills*, 595.

4159. Beneficiaries under will not cited are not estopped in proceeding to caveat. *Mills v. Mills*, 595.

4162, 1734. An estate tail by devise converted into fee. *Washburn v. Biggerstaff*, 624.

4242. Evidence of burning of another barn not admissible when no causal connection is shown. *S. v. Deadmon*, 705.

4278. Evidence of intent to defraud one who has endorsed note under promise to obtain other endorsers thereon. *S. v. Johnson*, 506.

4447. Evidence of denial of paternity in action of abandonment of child takes case to jury on that question. *S. v. Ray*, 628.

4622. Solicitor is not required to select between two charges in indictment for same class of crime. *S. v. Charles*, 868.

4642. When court must submit question of murder in second degree. *S. v. Newsome*, 552.

4643. When judgment of nonsuit on evidence is properly denied. *S. v. Leonard*, 242.

4643. Motion of nonsuit disallowed when State has made out prima facie case of possession of intoxicating liquor. *S. v. Dowell*, 523.

5428, 5437, Vol. 3. Courts will not interfere with discretionary power given to county board of education to unite or transfer schools. *Clark v. McQueen*, 714.

5481, Vol. 3. Power of school board to consolidate contiguous school districts. Findings of fact by lower court not reviewable. *Parker v. Debnam*, 56.

5523, 5605, 5575, 5571, 5559, 5561, 5516, Vol. 3. Contracts with teachers made by county superintendent valid under these statutes. *Hampton v. Board of Education*, 213.

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5180, 5183. Borrower and stockholder of B. & L. Association is debtor and creditor, and is not entitled to offset debt due corporation with amount paid on stock. *Rendleman v. Stoessel*, 640.

6363, 6367. Sale of stock by one not receiving commission does not fall within provisions of these sections. *Hotel Corp. v. Dennis*, 420.

6413. Retaliatory tax on foreign insurance companies not repealed by later general statute. *Ins. Co. v. Wade*, 424.

7768, 7901. One appointed by judge to settle estate under provisions of consent judgment is trustee and not administrator. Properly held by him for charitable institution not taxable. *Bank v. Commissioners of Yancey*, 678.

7776, 7979. Recommendatory power of Supreme Court may not be invoked to recover taxes paid. *Rotan v. State*, 291.

CONSTITUTION (For convenience in annotating).

ART.

II, sec. 29. Special acts relating to health void. *Sanitary District v. Prudden*, 722.

IV, sec. 8. Questions of law and of legal inference only reviewable by Supreme Court. *S. v. Leonard*, 242.

IV, sec. 8. Powers of Supreme Court to review. *Lacy v. State*, 284.

IV, sec. 9. Supreme Court will dismiss action against State when issue of fact is raised. *Lacy v. State*, 284.

IV, sec. 9. Supreme Court will not exercise original jurisdiction in action to recover taxes paid. *Rotan v. State*, 291.

IV, sec. 12. Powers of Supreme Court to review. *Lacy v. State*, 284.

V, sec. 6. Support of poor and convicts current expense. *R. R. v. Cherokee County*, 756.

VII, sec. 7. Courts without authority to supply omission of resolution of county commissioners to state bond issue necessary for six months term of school. *Hall v. Comrs. of Duplin*, 367.

VII, sec. 7. Does not require approval of voters for county issuing bonds for Statewide system of public schools. *Owens v. Wake County*, 132.

IX, secs. 1, 2, 3. Makes mandatory the maintenance of six months term of public school, and approval of voters not necessary. *Owens v. Wake County*, 132.

X, sec. 2. Conveyor of lands loses homestead right therein, with right to select homestead in other lands. *Duplin County v. Harrell*, 445.

X, sec. 2, 8. Homesteader entitled to homestead in equity of redemption against judgment liens. *Cheek v. Walden*, 752.

X, sec. 4; XIV, sec. 4. Surety bond given to State Highway Commission under our statute is to protect laborers and material furnishers. *Lumber Co. v. Lawson*, 840.

CONSTITUTIONAL LAW (Force of Foreign Judgments see State A a).

A Distribution of Governmental Powers and Functions.

a Legislative Powers (of Taxation see Taxation B b 1, 3.)

1. The General Assembly is without power to prescribe rules of practice or procedure for the Supreme Court. *Lacy v. State*, 284.

B Vested Rights; Obligations of Contracts.

a No Vested Right in Procedure

1. No vested right can be acquired under a statute which only relates to the procedure to be observed for the enforcement of the defense of a right. *Dunn v. Jones*, 354.

2. The statute of 1927, amending the Public Laws of 1925, prohibiting the joinder of the assurer in an action against the assured, relates to the remedy, and its enforcement does not impair the obligations of a contract of indemnity. *Brown v. Auto Co.*, 647; *Williams v. Motor Lines*, 682.

C Police Power (see, also, Municipal Corporation B a 1).

a Health

1. Statutes of general application relating to health, sanitation, etc., fall within the police powers of the State. *Sanitary District v. Prudden*, 722.

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CONSTITUTIONALITY—Presumption of Statute's see Statutes A c—of Ordinances see Municipal Corporations B a—of Creation of Sanitary Districts see Sanitary Districts A—of Statute Relating to Taking Over County Roads see Highways A a 3—of Transfer Tax see Taxation E a.

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CONTINGENT REMAINDERS see Wills E a 1.

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CONTRACTS (Liability of Contractor for Injury to Servant of Subcontractor see Master and Servant A b 1—for Teachers' Salaries see Schools and School Districts B a—with Sender of Telegram see Telegraphs A—with State Highway Commission see Highways A b—Ratification of Contract see Principal and Agent A a—Usurious Contracts see Usury—for Services Rendered see Principal and Agent B—Impairment of Obligations of Contract see Constitutional Law B).

A Requisites and Validity.

a Validity of Assent

1. A written contract for the purchase of certain yarns by the authorized officer of a manufacturing company containing a provision that if the yarn did not come up to specifications it was to be returned to the plaintiffs, agents of the seller, acting upon commission, who were then to supply yarn that met the requirements of the contract, will be upheld by the courts when it is made to appear that no fraud was practiced in its procurement, and that the one who

CONTRACTS—*Continued.*

executed the contract for the purchaser could have read and understood its terms and was afforded an opportunity to do so, but executed the contract without reading it. *Forbes v. Mill Co.*, 51.

b Contracts in Restraint of Trade

1. A contract for the sale of a cafe or cafeteria, in a town, and the good-will of the business for a period of five years does not affect the interest of the public or bring it within the terms of our statute applying to the common-law doctrine as to prevent unlawful trusts or combinations in restraint of trade. C. S., 2563(8). *Hill v. Davenport*, 271.

B Construction.

a Conditions of Payment

1. Where the contract for the sale of goods to be shipped at stated intervals with certain terms of credit to the purchaser, provides that at the seller's election he has the right to demand cash payment, if at any time it considered that the purchaser's credit was unsatisfactory, evidence that the purchaser became in arrears under the contract by inability to pay according to its terms, is sufficient for the seller to exercise his right to cancel the credit, and to demand cash before making further shipments according to the other terms of the contract. *Seed Co. v. Jennette Bros.*, 173.

b Conditions of Time

1. In an action to recover the contract price for the construction of a highway, specifying a time limit for its completion, damages for the failure of the contractor to complete the work within the time specified is not recoverable when the evidence discloses that no claim was made therefor. *Porter v. Construction Co.*, 328.

c Construction of Contracts as Entire or Divisible

1. Where a contract is expressed in clear terms, its construction is a matter of law as to whether it is entire or divisible. *Highway Commission v. Rand*, 799.

C Performance or Breach.

a Acceptance of Performance

1. In an action to recover the contract price for the building of a highway wherein the question of the acceptance of the work was involved, the refusal of the court to instruct the jury that a certain employee was not authorized to accept the work is not error when there is evidence that it was acquiesced in by one authorized to accept it. *Porter v. Construction Co.*, 328.

b Acts Held Not a Breach

1. In a contract for two hundred barrels of shellac, shipments to come forward biweekly, buyer to advise when shipments to commence and number of barrels to be included in each shipment: *Held*, an order by the buyer of two barrels of shellac to be shipped every two weeks until further notice is not so unreasonable as to amount to a breach of the contract by the buyer, and the buyer's motion of nonsuit is properly entered in the seller's action for breach. *Feigel v. Products Co.*, 659.

CONTRACTS—*Continued.*

D Actions for Breach (Admissibility of Extrinsic Evidence see Evidence C a 2).

a Requisites

1. A party to a contract cannot maintain an action to recover damages from the other party for its breach, without showing performance or readiness to perform the material obligations resting upon him thereunder, as a consideration therefor. *Seed Co. v. Jennette Bros.*, 173.

2. To recover on an express contract with decedent for personal services rendered him prior to his death, plaintiff must show performance on his part. *Southerland v. Crump*, 856.

b Measure of Damages

1. Where the wholesale purchaser of sugar has breached his contract to receive barrel lots at his contract price, the seller, in his action thereon is entitled to recover the difference between the price so fixed and the fair market value. when a less amount, upon a resale after giving the purchaser sufficient notice of his intention to do so, which is disregarded. *Lamborn v. Hollingsworth*, 350.

c Demurrer to Contract Alleged But Not Set Out in Pleadings

1. A demurrer to a complaint of an illegitimate son against his putative father upon a contract alleged, but not set out, is bad, the sufficiency of the consideration not appearing, being a question for the jury under the evidence introduced upon the trial. *Hyatt v. McCoy*, 762.

CONTRIBUTORY NEGLIGENCE see Negligence D—in Railroad Cases see Railroad A b 1.

CONVERSION see Trover and Conversion.

CONVERSION AND RECONVERSION see Descent and Distribution A a 1.

CORPORATIONS.

A Dividends.

a When Directors Must Declare

1. Where under the provisions of C. S., 1178, the accumulated profits of a private corporation in excess of the working capital has been ascertained, the directors are without authority to carry it to the surplus fund, and upon the demand of the stockholders it must be distributed into dividends in accordance with the requirements of the statute, and mandamus will lie to compel such distribution. *Cannon v. Mills Co.*, 119.

b Amount of, How Determined

1. To preserve unimpaired the capital stock of a private corporation and to ascertain the amount that can be declared as dividends according to C. S., 1178, the surplus should be ascertained in the manner prescribed by taking the assets of the corporation according to their cash value, and, in the case of a manufacturing company, the further sum for depreciation should be taken into account. C. S., 1179. *Cannon v. Mills Co.*, 119.

CORPORATIONS—*Continued.*

B Incorporation and Organization.

a License to Sell Stock in Prospective Corporation

1. Notes given for the purchase of shares of stock in a corporation being organized are not void for noncompliance with the provisions of C. S., 6363, 6367, when the shares were not put upon the market by agents, or commissions paid to any one for procuring subscriptions thereto. *Hotel Corporation v. Bell*, 192 N. C., 620, cited and distinguished. *Hotel Corporation v. Dennis*, 420.

C Corporate Powers and Liabilities.

a Liability of Corporation Purchasing Another's Stock for Debts of Purchased Corporation

1. An existing corporation, when retaining its corporate identity and retaining assets sufficient to pay its creditors, does not effect a merger by exchanging its stock with another and similar corporation, so as to make the latter liable for its debts under the doctrine of implied assumpsit or substitution of debtors, in the absence of fraud. C. S., 1005. *Askew v. Hotel Co.*, 456.

COSTS—Attorney's Fees as Costs see Attorney and Client B a.

COUNTERCLAIM see Pleadings B.

COUNTIES, POWER OF TAXATION, see Taxation B a—Correction of Minutes of Levy of Taxes see Taxation D 1.

COURTS (Superior Court, Jurisdiction by Consent of Parties see Judgments B a 2—Jurisdiction to Appoint Receiver for Drainage District see Drainage Districts C a 1—Powers of Superior Court Judges see Judges).

A Supreme Court.

a Jurisdiction In General

1. The general jurisdiction given to the Supreme Court under the provisions of our Constitution, Art. IV, sec. 8, is a reviewal of the lower courts on matters of law and legal inference, with the power to review questions of fact in certain instances in matters of purely equitable nature, and to prescribe the rules of practice and procedure in the lower courts when not in conflict with rules prescribed by the General Assembly, Art. IV, sec. 12. C. S., 1421. *Lacy v. State*, 284.

b Original Recommendatory Jurisdiction

1. The Supreme Court in the exercise of its recommendatory original jurisdiction to hear claims against the State, Art. IV, sec. 9, will dismiss any action brought against the State where the sole issue is one of fact. *Lacy v. State*, 284.

2. When the nonresident executors of a testator have failed to proceed in the Superior Court, under the provisions of C. S., 7776, to recover an amount they have paid as an inheritance tax to the State of North Carolina, the method therein by which the Legislature has the State to be sued is exclusive, and the recommendatory original jurisdiction given by the Constitution, Art. IV, sec. 9, to the Supreme Court may not be invoked. C. S., 1410. *Rotan v. State*, 291.

COURTS—*Continued.*

B Federal Courts (Force of Federal Judgments in State see State A a 3).

a Jurisdiction of Inheritance Tax Levied by the State

1. The decision of the Supreme Court of the United States holding an inheritance tax invalid controls that of the State Court upon the question when the tax is an inheritance or transfer tax upon shares of stock of a deceased nonresident testator held in a foreign corporation doing business in this State, and having transfer books here, when the shares and the devisees are beyond the jurisdiction of our courts. *Rotan v. State*, 291.

COVENANTS see Deeds and Conveyances, Contracts.

CRIMINAL LAW (Larceny, Homicide, False Pretense, Indictment, Intoxicating Liquor, Embezzlement see Particular Heads—Violation of City Ordinance see Municipal Corporation B b—Nonsupport of Child see Parent and Child A a).

A Evidence (in Embezzlement, Larceny, etc., see Particular Heads).

a Sufficiency

1. Circumstantial evidence of a homicide is not sufficient when by any reasonable inference therefrom the question of guilt should remain uncertain in the mind of the jury, and under these circumstances defendant's motion as of nonsuit should have been allowed. *S. v. Montague*, 20.

b Character Evidence

1. In a criminal action the defendant may put his character in issue as substantive evidence of his guilt or innocence, without being himself a witness, and, when his character is thus in issue, the State may introduce evidence of his bad character. *S. v. Nance*, 47.

2. Exceptions by defendant in a criminal action to questions tending to impeach the character of his witnesses cannot be sustained on the ground that he had not taken the witness stand, or placed his own character in evidence. *S. v. Holt*, 241.

3. When a character witness states within the rule that the defendant, tried for violating the prohibition law, was a man of bad character, and voluntarily adds, "I have had several reports on him," and it is made to appear that the opinion of the witness was not based on such reports: *Held*, not reversible error. *S. v. McLawhorn*, 327.

4. If a defendant testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence should affect only his credibility as a witness. *S. v. Idol*, 497.

c Confessions

1. Only free and voluntary confessions of one accused of crime, uninfluenced by a promise of favor or a threat, are competent on the trial as evidence against him, but a confession is not rendered involuntary because made to officers of the law having the defendant under arrest at the time. *S. v. Newsome*, 552.

CRIMINAL LAW—*Continued.*

2. Confessions of a defendant while under arrest are not rendered inadmissible at the trial on the ground that at the time of his making them the officers of the law having him in custody assured him that they would protect him from mob violence feared by him. *Ibid.*

d Confidential Communications

1. The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient mental capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and C. S., 1798, is not applicable. *S. v. Newsome,* 552.

e Error in Admitting Evidence Cured by its Withdrawal

1. Where the evidence is cumulative as to the confessions of one accused of crime, the error, if any, in the admission of evidence of one of the confessions, is cured by the trial court when he clearly withdraws the evidence from the consideration of the jury. *S. v. Newsome,* 552.

f Credibility to Be Given Defendant as Witness

1. A witness charged with a felony, who takes the stand to testify in his own defense, is entitled to have the jury accept his testimony as that of a disinterested witness if they should find him worthy of the same belief, notwithstanding his interest, and when the judge charges the jury, without this qualification, that the law requires them to scrutinize carefully testimony of this character, to examine it thoroughly because of the great interest of the witness in their verdict, etc., it constitutes reversible error. *S. v. Ray,* 619.

B Instructions (Homicide, Intoxicating Liquor, etc., see Specific Heads).

a Held Erroneous

1. When in an action before a jury in a criminal case a controversy arises between counsel as to the admissibility of evidence against the character of defendant, and the defendant counsel argues to the jury that such evidence is not introduced because there is none, and the court instructs the jury that the State could not put on such evidence: *Held,* under the circumstances in this case, such instruction is reversible error. *S. v. Nance,* 47.

b Held Not Error

1. Where it clearly appears that the judge referred to all the evidence on the trial of a criminal action, his referring to it as "the evidence" in his charge as to the burden of proof is not reversible error. *S. v. Leonard,* 242.

2. Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eye-witnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eye-witnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by C. S., 564. *S. v. Boswell,* 496.

CRIMINAL LAW—*Continued.*

3. A *lapsus linguæ* of the judge in stating his recollection of what witnesses testified to a fact in evidence should be brought to the attention of the judge at the time, and when this is not done it will not be considered on appeal. *S. v. Geurukus*, 642.

C Pleading (Indictment see Indictment).

a Amendment to Indictment, When Allowed

1. An indictment before a justice of the peace may be amended by the trial judge upon the trial in the Superior Court on appeal. C. S., 1500. *S. v. Holt*, 241.

F Appeal and Error.

a Prosecution of Appeal Under Rules of Court

1. An appeal by defendant convicted of a capital felony will be docketed and dismissed when taken and not prosecuted under the rules of court on motion to docket and dismiss, made by the Attorney-General; no error appearing upon the face of the record. *S. v. Ward*, 180 N. C., 693. *S. v. Thomas*, 458; *S. v. Clyburn*, 618.

b Necessity for Motions, Exceptions and Assignment of Error to Present Question in Supreme Court

1. The question as to whether the defendant is entitled to a new trial on the ground that the verdict was influenced by hostile demonstrations in the courtroom during the trial, must be raised by the defendant by motion for a new trial and exception to the refusal of the trial court to grant same. *S. v. Newsome*, 552.

2. A statement appearing after the signature of the judge to his settlement of a criminal case on appeal that defendant excepts to the failure of the judge to charge the jury on the law of former jeopardy, without assignments of error in this respect, is alone insufficient, under the rules, to present the matter to the Supreme Court. Rule 21. *S. v. King*, 621.

G Former Jeopardy.

a Burden of Proving Plea

1. The burden of the proof of former jeopardy in a criminal action is upon the defendant, and for it to be considered on appeal it must appear that he had aptly submitted, or offered to submit, an issue thereon. *S. v. King*, 621.

CROPS—Tenant's Right of Action for Destruction see Landlord and Tenant B a—Lien on Crops see Landlord and Tenant C a.

CURTESY—Release of Inchoate Right of Curtesy see Husband and Wife B a.

DAMAGES—in Action for Breach of Lease Contract see Landlord and Tenant A b—in Libel and Slander Cases see Libel and Slander B—Waiver of Damages see Contracts B b 1—Measure of for breach of contract see Contracts D b—for Negligent Injury see Negligence C a.

DEBTOR AND CREDITOR see Sales A b—Account, Action on, A—Building and Loan Association B—Fraudulent Conveyances—Accord and Satisfaction.

DECLARATIONS AGAINST INTEREST see Evidence G.

DEEDS AND CONVEYANCES—(When Drainage Assessments are Encumbrances within Warranty Deed see Drainage Districts—Reformation see Reformation of Instruments—Converting Deed into Mortgage see Mortgages B, Limitation of Action Therefor see Limitation of Actions A b 1).

A Requisites and Validity.

a Registration Within Statutory Period

1. A deed of gift not registered within the time prescribed by statute is void, and thereafter the Legislature is without power to bring it to life again by the enactment of a statute lengthening the period in which it may be registered. *Booth v. Hairston*, 8.

b Statute of Frauds

1. Where the vendor of lands in substantial conformity with his parol agreement with his vendee tenders a deed to the lands to him, which the latter refuses because the amount of the agreed purchase price had been increased, and after the vendor had sold the lands brings his action for damages: *Held*, the deed tendered is a sufficient writing within the statute of frauds to bind the vendor, and the vendee may recover the damages he has sustained by the defendant's breach of contract to convey. *Oxendine v. Stephenson*, 238.

B Construction and Operation.

a Estates and Interests Created

1. The life tenant and the contingent remainderman may convey by valid deed the full fee-simple title to the lands so held by them. *Trafton v. Flora*, 187.

2. A deed of land to a man and his wife by name, during the terms of their natural lives "and after the death of both of them, then to their children in fee simple," confines the takers under the limitation to the children of that marriage and excludes the children of the husband of a second marriage after the death of his first wife. *Turner v. Turner*, 371.

3. A deed sufficient to convey real property in fee simple, describing with sufficient definiteness of location "a certain house or tenement" in a town, conveys the title to the lot that the building covers, in the absence of the intent of the grantor otherwise appearing in the instrument by a proper interpretation thereof. *Tadlock v. Mizell*, 473.

4. A sufficient deed conveying a certain house or tenement on lands in fee simple, containing in the warranty of title a clause in parentheses, "but not the land upon which it is situated" does not alone show a sufficient intent of the grantor to convey only the house or tenement as personal property, and not the lands. *Ibid.*

5. A deed to the grantor's daughter conveying the lands to be held, with remainder over as designated thereinafter, with *habendum* to her for her natural life then over to any child or children she may leave surviving her in fee, qualified by the expression, should any child or children born unto her predecease her, the other such children should take in fee, with an ultimate and further contin-

DEEDS AND CONVEYANCES—*Continued.*

gent limitation over: *Held*, giving the intent of the testator controlling significance, a child adopted after the death of the grantor, no other child having been born, is excluded as against the ultimate takers of the blood of the grantor provided by the deed. C. S., 185. *Tankersley v. Davis*. 542.

aa Estates and Interests Created Under Rule in Shelley's case. (Under Wills see Wills E b.)

1. Where the description of the grantees in a deed is to L. and her children, and the granting clause and the other relevant parts of the deed conveys to L. a life estate in the lands, and then "to her heirs, executors, administrators and assigns": *Held*, L. takes a fee-simple estate under the rule in *Shelley's case*, the word "children" in the preliminary designation being regarded as an inadvertence. *Martin v. Knowles*, 427.
2. The rule in *Shelley's case* applies when, and only when, there is an estate of freehold granted to A. with a limitation over, either mediately or immediately, in fee or in tail, to the heirs of A. *Ibid.*
3. As to whether a limitation over is to heirs *qua* heirs, is a preliminary question to be decided by general rules of construction, and is determinative of the applicability of the rule. *Ibid.*
4. The rule in *Shelley's case* is a rule of law, and not a rule of construction. *Ibid.*

b Warranties

1. Where the purchaser of lands assumes prior encumbrances thereon and takes under a deed warranting an unencumbered title, and mortgages the land back for the payment of the purchase price, and then conveys to the defendant against whom the plaintiff brings action after the lands had been sold under the first mortgage for wrongfully removing a building from the mortgaged premises without his consent: *Held*, the defendant is not a party to the plaintiff's deed and he cannot claim the benefit of the warranty therein, or be thus advantaged by his own tort. *Edwards v. Meadows*, 255.

bb Restrictive Covenants

1. A restriction in a deed that only one dwelling-house be erected on the lot of land conveyed will not be enforced when business and apartment houses have been erected in the locality, and the nature of the development has changed so that the value of the land would be greatly depreciated by the restriction, thus rendering the enforcement of the restriction inequitable or oppressive. *Higgins v. Hough*, 652.
2. A restricted covenant in a deed to lands divided into lots requiring that the lots conveyed "shall be used for residential purposes only, and there shall not at any time be more than one residence or dwelling-house" thereon, evidences the intent of the grantor to exclude all buildings thereon other than dwelling-houses, but does not exclude apartment houses so arranged that several families may reside separately in the various apartments in the same building and under the same roof. *Construction Co. v. Cobb*, 690.

DEEDS AND CONVEYANCES—*Continued.*

3. In construing restrictive covenants in a deed as to the character of the buildings that may be erected on a lot sold, with others, in the development of an area of lands, the courts will incline to such reasonable construction as will resolve a doubt in favor of the free and untrammeled use of the property for lawful purposes. *Ibid.*

4. Restrictive covenants in a deed to lots of land, a part of a residential development as to the costs of dwellings thereon, does not obligate the grantee, who erects an apartment house thereon, to make the cost of each apartment not less than the designated amount as to separate dwellings. *Huntington v. Dennis*, 759.

c General Rules of Construction

1. The object to be obtained in the interpretation of a deed is to effectuate the intent of the parties from the interpretation of the instrument as a whole, giving effect, if possible, to all of its parts; and where its terms are contradictory the first expressed will control; and language of doubtful meaning will be construed in the light favorable to the grantee; and a known and controlling call will prevail over descriptive specifications; and a prior perfect description that identifies the property will prevail over a later one. *Benton v. Lumber Co.*, 363.

2. The limitation over by deed may be construed, as in the present case, to effectuate the grantor's intent taken with regard to the circumstances surrounding him at the time of the conveyance, and the subject-matter thereof. *Turner v. Turner*, 371.

C Boundaries.

1. The question of sufficiency of boundaries given in a deed to lands is one of law, and the disputed location of the lands within these boundaries is one of fact for the jury upon the evidence, and presents a mixed question of law and fact upon the issue. *Benton v. Lumber Co.*, 363.

2. Where in an action of trespass upon lands the description of the boundaries in a deed is sufficient in law, and the evidence tends only to show that the *locus in quo* was necessarily included to make the boundaries designated in the deed, an instruction is not error that directs a verdict thereon. *Ibid.*

D Timber Deeds.

a Construction

1. Where N. and G. are grantees in a deed for standing timber upon certain lands, to be cut and removed within ten years, and thereafter N. becomes the owner of the lands, subject to the timber deed to himself and G., and N. conveys to G. the timber rights he has acquired under the former deed, referring thereto, and in his deed to the timber receives certain rights to cultivate the lands when cut over by G. and designated by him, with a further right of G. to cut and remove a certain kind of timber within two years from the first cutting: *Held*, G. could under the deed from N. cut the designated timber in a period of two years from the first cutting only when coming within the maximum time limit of ten

DEEDS AND CONVEYANCES—*Continued.*

years, and to this extent it was an enlargement of the right conveyed by the deed for the timber to N. and G. *Norris v. Galloway*, 14.

E Torrens Deeds.

a Claims Against the State Under Assurance Fund

1. The proceedings by the owner to register his land under the Torrens system is in the nature of proceeding *in rem*, requiring description of the land to be affected, with indexing giving notice, etc., and while pending is notice to a mortgagee thereof without the necessity of the filing of a formal *lis pendens*, and where the mortgagee fails to protect himself under the provisions of the statute, and the title to the land has been assured by the State, and a holder thereof by proper transfer has acquired the title, the negligence of the mortgagee is a complete defense in the mortgagee's action to recover damages against the State thereunder. *Brinson v. Lacy*, 394.

2. Where in the mortgagee's action against the State Treasurer for damages sustained by reason of the assurance of title by the State to a purchaser under a Torrens deed from the owner of the land, it appears from the pleadings that the damages were caused by his failure, with notice of the proceedings under the Torrens Act, to protect his rights, the demurrer to the pleadings by the defendant should be sustained. *Ibid.*

DEMONSTRATIVE BEQUESTS see Wills E f.

DEMURRER see Pleadings A.

DEPOSITIONS see Evidence D.

DESCENT AND DISTRIBUTION.

A Nature of Property.

a Excess in Foreclosure of Deceased's Lands

1. The surplus going to the estate of a deceased mortgagor after a foreclosure sale of a mortgage on lands is regarded in equity as lands, descendible to his heirs at law. *Privott v. Wright*, 181.

B Persons Entitled.

a Illegitimate Children

1. An illegitimate child may not inherit as heir at law from her deceased grandfather, dying intestate, through her legitimate mother who predeceased him, under our canons of descent. C. S., 140; 137, clauses 4 and 5. *In re Bullock*, 188.

2. The statute of 1917, now C. S., 279, making a bastard child legitimate for the purposes of inheritance from his putative father when the father afterwards marries the mother, is, by its express terms, retroactive as well as prospective in effect; and upon the dying intestate of the father, under the facts of this case, the son is entitled to the balance of the proceeds of the sale of land to make assets to pay debts, subject to his mother's dower right, after paying creditors and court costs, as against the collateral heirs of the father. *Stewart v. Stewart*, 476.

DIRECTED VERDICT see Trial D a.

DISABILITY CLAUSES IN INSURANCE POLICIES see Insurance C.

DISCRETION see Arbitration and Award B 1—Judges A b 1—Negligence C c.

DISMISSAL see Trial C.

DIVISIBLE CONTRACTS see Contracts B c.

DIVORCE, Conformity of Judgment to Verdict see Judgments B a 1, 2.

DOCKETING—Case on Appeal see Appeal and Error A d 4.

DOWER, Right of After Divorce see Judgments B a 1.

DRAINAGE DISTRICTS.

A Assessments.

a When They Become Lien on Land

1. Liens on lands within a statutory drainage district for assessment charges for its maintenance and upkeep do not fall within a warranty or covenant against encumbrances contained in a deed until they are due and payable, within the intent and meaning of the statutes regulating the subject. *Branch v. Saunders*, 176.

B Rights and Liabilities of Parties.

a Under Consent Judgment Made in Its Formation

1. A consent judgment entered in the forming a statutory drainage district with regard to the cutting and maintaining drainage ditches, in connection with ditches to be maintained by owners of the land partly lying within and partly without the district is to be interpreted as the contract of the parties, and binding upon the owners of the land included within the district thus formed. *Cox v. Drainage District*, 264.

2. Where by the terms of a consent judgment entered into by the proper authorities of a drainage district being formed with certain owners of land partly lying within and partly without the district, it is set forth that such owners maintain ditches upon their outside lands flowing into those of and within the district, upon certain conditions as to the flowing of the water, and the district is thus formed, other owners of the land may not recover damages to their land against those who have constructed the outside ditches upon their own land, when a different remedy is provided in the consent judgment. *Ibid.*

C Creation and Existence.

a Appointment of Receiver for Void District

1. A drainage district organized pursuant to chapter 442, Public Laws 1909, prior to the amendment of chapter 7, Public Laws 1921, is not a political subdivision of the governmental powers of the State of the same dignity as a county, or city, and where one of these districts has not conformed to the law in its formation, and is therefore void, the courts of the State have in proper instances the authority to preserve the property thereof and protect the rights

DRAINAGE DISTRICTS—*Continued.*

of those in interest by the appointment of a receiver to the final hearing, without the aid of statute. *Broadhurst v. Drainage Commissioners*, 439.

b Vested Rights Under Orders Under Prior Act Cannot be Affected by Subsequent Act of Legislature

1. The proceedings in forming a drainage district under the provisions of chapter 442, Public Laws 1909, is judicial and not administrative, and the amendment of chapter 7, Public Laws 1921, making all districts theretofore or thereafter created a political subdivision of the State cannot affect vested rights of landowners acquired under orders, judgments, or decrees made in pursuance of the powers conferred by the original act. *Broadhurst v. Drainage Commissioners*, 439.

EJECTMENT.

A Presumption of Title out of State.

1. In an action of ejectment involving title to lands, where the State is not a party, other than in trials of protested entries, etc., title is conclusively presumed to be out of the State, and it is error for the trial judge to instruct the jury that the burden of proof is on the plaintiff to show this in addition to sufficient adverse possession to ripen the title in himself. C. S., 426, 428, 430. *Dill v. Downs*, 189.

ELECTIONS.

A Sufficiency of Description of Territory.

1. Under the facts of this case: *Held*, there was sufficient evidence that the definition of the territory voting for the stock law in a certain section of Jackson County was sufficiently certain under the requirements of a public-local law relating to that county, and that the description was sufficiently definite. *Monteith v. Comrs. of Jackson*, 71.

B Qualification of Voters.

a Residence

1. In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent, and not of a temporary character, corresponding with the word domicile. *Gower v. Carter*, 697.

2. Those who are teachers in a locality, and their right to vote therein is made to depend upon whether they were residents therein only for the scholastic year, a question is incompetent that asks them of their intention to make the locality their legal residence, since the answer involves a question of law as to what constitutes a sufficient legal residence to qualify them to vote. *Ibid.*

ELECTRICITY.

A Duties of Power Companies in Respect Thereto, and Liability for Injuries Therefrom.

1. Companies manufacturing and transmitting deadly currents of electricity are charged with the duty not only to construct, but to maintain its wires in a condition commensurate with the danger

ELECTRICITY—*Continued.*

to the public, and having control or management of the plant, the doctrine of *res ipsa loquitur* applies when it is shown that an injury or death has been occasioned that would not have occurred under ordinary conditions, leaving the question of negligence an issue for the jury. *Ramsey v. Power Co.*, 788.

2. Where a railroad company has permitted an electric transmission power company to maintain one of its transmission poles on the railroad right of way, and has negligently shunted one of its cars so as to cause it to strike the pole and cause the deadly current of electricity from high voltage wires to become short circuited, causing visible signs of danger both at the pole and other places to which the current was thus transmitted, causing the death to an employee of a user of the otherwise harmless current: *Held*, the question of reasonable repair by the power company is one for the jury in the action against both defendants for the wrongful death. *Ibid.*

EMBEZZLEMENT.

A Indictment.

a Form and Sufficiency

1. When the evidence upon the trial tends to support charges in the indictment that the defendant was an officer, agent, and director of a bank, and had unlawfully, willfully and feloniously embezzled a certain amount of its funds held in trust, with the intent to defraud, following the material words of the statute in force at the time of the committing of the offense charged, it is sufficient to sustain a general verdict of guilty upon the charges contained in the indictment, variously stated as did "embezzle," did "abstract," etc., and a demurrer thereto is bad. 3 C. S., 224(e), 4401; Public Laws of 1927, ch. 42, sec. 16. *S. v. Maslin*, 537.

2. Under an indictment of an officer of a bank for embezzling a part of its trust funds, the charge embezzlement carries the meaning of the wrongful conversion of the funds by the defendant to his own use, and the failure to specifically charge that the bank had entrusted the defendant with the funds, or that there had been a breach of a trust relationship by the defendant with the bank is not a requisite to its validity. *Ibid.*

B Evidence.

a Expert Evidence to Trace Book Entries

1. Expert evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. *S. v. Maslin*, 537.

EMINENT DOMAIN.

A Proceedings to Assess Compensation.

a Evidence of Value

1. When the value of a building used as a store, and taken by the State Highway Commission in the construction of its highway, is to be determined in an action against it, the rental value of the building

EMINENT DOMAIN—*Continued.*

is competent upon the question of the fair market values at the time of the taking, and while the purchase price of the land eighteen years before would ordinarily be too remote to be competent evidence, it is otherwise on cross-examination when the plaintiff himself has testified as to its value to test the accuracy of his opinion thereof, and to show the basis of the opinion. *Palmer v. State Highway Commission*, 1.

b Matters Adjudicated

1. In a condemnation of part of a tract of land for ponding waters, when the compensation for the land taken, and the depreciation resulting therefrom to the part of the tract not taken is adjudicated, but the issue of damages resulting from the creation of a nuisance by the pollution of the waters impounded is withdrawn from the jury and the opposing party does not object, the condemnation proceeding does not bar, under the plea of *res adjudicatur*, the right of action on the issue of the private nuisance. *Moses v. Town of Morganton*, 92.

c When Right of Action Arises

1. Where the board of county road commissioners runs its road in such close proximity to the plaintiff's house as to be a menace, and thereafter adopts a resolution relocating the road to avoid this damage, and in point of fact this resolution remains in full force though the board has attempted to rescind it, upon the future rescinding of the resolution the plaintiff has an immediate right of action for damages for the taking of his property by condemnation, and the bar of the statute of limitations upon the theory that the claim in the present action should have been made in sixty days from the completion of the road is untenable. *Gaddis v. Road Commission*, 107.

d Right to Trial by Jury

1. In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by jury in the Superior Court to determine his damages when he has duly preserved it by his exceptions and proper procedure, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. C. S., 1724. *Ayden v. Lancaster*, 297.

B Compensation.

a Grounds Therefor

1. In condemnation of land for ponding waters, the person whose land is condemned has a right to compensation for the land taken, and when the land so taken is a part of an entire tract, for resulting depreciation to the part not taken, and for special damages resulting from the creation of a nuisance by the pollution of the water ponded, when such is proven, since the condemnation of the land looks to the impounding of water in its natural state, and not to polluted water. *Moses v. Town of Morganton*, 92.

EMPLOYER AND EMPLOYEE see Master and Servant.

ENDORSERS see Bills and Notes.

ENTIRE OR DIVISIBLE CONTRACTS see Contracts B c.

EQUITY—Reformation of Instruments see Reformation of Instruments—Conversion see Descent and Distribution A a 1—Converting Deed into Mortgage see Mortgages B; Limitation of Action Therefor see Limitation of Actions A b—of Redemption see Mortgages A a 1, A b 1—Right to Homestead Therein see Homestead B—Restraining Foreclosure see Mortgages C b—Rights of Prior Assignee see Assignments A a.

ESCAPE.

A. Right of Officer to Use Force to Prevent Escape.

1. An officer of the law may use such force as may appear to him to be reasonably necessary in preventing the escape of one whom he has lawfully arrested, extending to the use of firearms after being attacked by the prisoner with a stick, a deadly weapon. *S. v. Jenkins*, 747.

2. When supported by the evidence the question is for the jury as to whether an officer has used such force as appeared to him reasonably necessary to prevent an escape, or has used such excessive force as to make the use of a pistol a crime under the circumstances. *Ibid.*

3. The extent of the force used by an officer to prevent an escape after arrest does not depend upon the degree of the criminal charge against the one arrested. *Ibid.*

ESTOPPEL—by Judgment see Judgments A a—by Caveat Proceeding see Wills D b—by Partition Proceedings see Partition A b.

EVIDENCE (In Criminal Actions see Criminal Law and Particular Heads of Crimes—in Usury, Insurance, see Particular Heads—of Negligence on Highway, Railroad, see Particular Heads—of Undue Influence see Wills A a—on Motion of Nonsuit see Trial B—of Payment of Check see Bills and Notes A a 1—of Negligence of Master see Master and Servant A b—of Fraud in Procurement of Release see Release A a 1—of Violation of Ordinance see Municipal Corporation B b—in Action for Services Rendered see Principal and Agent B b 1—Newly Discovered Evidence see Appeal and Error D b).

A Competency.

a Character Evidence

1. The rules of law governing the admissibility of character evidence in criminal and civil actions are different, except that certain civil actions, such as libel and slander, seduction, etc., where character is involved, the rules governing criminal actions may apply. Rules to be applied on this question enumerated by BROGDEN, J. *S. v. Nance*, 47.

b Evidence at Former Trial

1. When the alleged words spoken and published, the subject-matter of an action for slander, are that the plaintiff had stolen certain goods and should be placed in the penitentiary, the plaintiff com-

EVIDENCE—*Continued.*

pany introduced the records of the court in a civil action formerly brought by the defendant to recover the value of the goods defendant had charged the plaintiff with stealing, which resulted in favor of the plaintiff in the present action. On the record this question was not necessary to be determined. *Ferrell v. Siegle*, 102.

c Ancient Records

1. Where the plaintiff's right of recovery for mineral interests on a described tract of land, both parties claiming under a common source, is made to depend upon a transfer to plaintiff's antecedent in the chain of title by a recorded paper-writing stating that the grantor in the deed acted solely as the agent for the plaintiff's predecessor in title, and appeared on the registration books as a part of the transaction in regular sequence, though not likewise ordered registered: *Held*, this record undisputed for a long lapse of time will become admissible as an ancient record, and its exclusion will be held reversible error to the plaintiff's prejudice. *Thompson v. Buchanan*, 155.

d Evidence Competent on One Issue

1. The admission of evidence at the trial that is competent on one of the issues involved will not be held for error as not being competent upon the others, unless the objecting party duly requests that it be confined to the issue upon which it is competent. Rule 21. *Butler v. Fertilizer Works*, 409.

e Impeaching Witness

1. Where a witness has testified that he had been indicted for illicit distilling, it is competent to ask him whether he had been convicted, when for the purpose of impeaching his credibility. *Nichols v. Bradshaw*, 763.

2. In an action by the wife to recover damages for an alleged negligent personal injury, a question asked the husband as to whether he had objected to the taking of an X-ray, has no impeaching effect as to his wife's testimony, and is properly excluded, and its exclusion is not held under the facts of this case for prejudicial error, as tending to impeach his testimony. *Flythe v. Coach Co.*, 777.

f Error in Excluding Evidence Cured by its Later Admission

1. Where evidence is erroneously excluded on cross-examination, but evidence of substantially the same character is later introduced on direct examination, the error is cured. *Nichols v. Bradshaw*, 763.

B Burden of Proof (in Lessor's Action see Landlord and Tenant A c—of City Ordinances see Municipal Corporations B b 1—in Criminal Actions see Criminal Law, Intoxicating Liquor, etc.—in Action for Fraud see Frauds B 1).

a In Taxpayer's Suit to Enjoin Sale of His Land

1. In a taxpayer's suit to enjoin the sheriff from selling his lands for the nonpayment of his taxes, based upon whether his check given therefor has been paid by the drawee bank, the burden is upon him to show this fact when he relies thereon. *Litchfield v. Reid, Sheriff.* 161.

EVIDENCE—*Continued.*

C Parol Evidence (in Usury Cases see Usury A a.)

a Admissibility to Explain Written Instrument

1. While parol evidence is not admissible to identify the lands to be conveyed in a written instrument of sale when the ambiguity or insufficiency of the instrument is patent, it is otherwise when the instrument itself is latently ambiguous in this respect, but may be explained by parol with certainty as to its identity within the understanding of the parties to the contract. *Gilbert v. Wright*, 165.

2. Where a written contract between the parties is susceptible of explanation by extrinsic evidence, and substantially incorporates previous correspondence, an instruction is not reversible error that the jury could consider the correspondence in arriving at the intention of the parties. *Porter v. Construction Co.*, 328.

3. Where a deed is not ambiguous, extrinsic evidence is not admissible to contradict, modify, or confirm its terms. *Heaton v. Kilpatrick*, 708.

D Presumptions.

a Receipt of Mail

1. Where a notice has been written and deposited in the United States mail, giving a telegraph company notice of a mistake made by it in the transmission of a message it had accepted for that purpose, it is sufficient evidence that it had been duly received by the company. *Newbern v. Telegraph Co.*, 259.

E Expert Testimony.

a Subjects of Expert Testimony

1. One who has qualified as an expert osteopath may testify from his examination of his patient and from the X-ray he has taken of the injury as to the permanent effect it has had on his patient, in an action to recover damages caused by the negligence of the defendant, and his expressing in percentage the proportion of its effect is not a ground for error. *Butler v. Fertilizer Works*, 409.

b Competency of Testimony in Explanation of Answer

1. Where an expert witness testifies in answer to a hypothetical question that he had an opinion as to the cause of the injury in suit, but that this opinion was not satisfactory to himself, and then in answer to a question asked him by the court testifies, "If I should have to express an opinion, I should naturally think that the injury she sustained was the cause of her condition thereafter, but this condition could have been caused without such injuries. That is why I say I have no satisfactory opinion as to the cause of her injuries" the reply to the question asked by the court is competent for the purpose of explaining why the witness did not have a satisfactory opinion as to the cause of plaintiff's condition. *Buckner v. R. R.*, 654.

F Depositions.

a Requisites

1. Where a witness testifies at the trial, depositions formerly taken of his testimony are incompetent for corroboration when they are not

EVIDENCE—*Continued.*

signed by him or the stenographer who transcribed them, nor properly certified to as such, and bearing "no extrinsic evidence of their correctness or accuracy." *Buckner v. R. R.*, 654.

G Declarations Against Interest.

1. Where insured goods have been destroyed by fire, and the owner has received payment for the loss from the insurance company, and the latter, under a writing of subrogation, brings action against a railroad for negligence in causing the loss, the admissions of the owner upon the issue of negligence involving the origin of the fire are incompetent when it clearly appears that he had no knowledge of the facts upon which his supposed admissions or declarations were predicated. *Ins. Co. v. R. R.*, 693.

EXECUTION.

A Wrongful Execution.

a Rights and Liabilities of Parties After Execution Set Aside

1. Where lands are sold under execution of a valid judgment and the purchaser has conveyed the same to another under a deed with full covenant and warranty of title, and the judgment debtor has successfully maintained his action to have the sale under execution set aside, the grantee in the deed from the purchaser at the execution sale is entitled in equity to subrogation of the rights of the execution creditor under the doctrine of an equitable assignment of such judgment to the extent that the lien thereof had been diminished. *Jeffreys v. Hocutt*, 339.

EXECUTORS AND ADMINISTRATORS (Payment of Legacy to Receiver of Insolvent see Receivers B c).

A Collection and Management of Estate.

a In General

1. After the foreclosure sale of a mortgage on lands of a deceased mortgagor, his executor or administrator is entitled to the surplus arising to his estate as his equity of redemption until it can be ascertained by him, under the regulations of the statute, whether it will become necessary for use in the payment of the debts of the deceased. *Privott v. Wright*, 181.

2. Where moneys in the hands of the clerk of the court is to be regarded as realty belonging to the heirs at law, the administrator of the deceased is not authorized by law to a judgment to recover it as assets belonging to the estate, when it appears that he is not proceeding against the heirs as such, but seeks only to recover the fund as personal property belonging to the estate. *Ibid.*

B Appointment.

a Only Clerk of Court May Appoint

1. The authority to appoint administrators for the estate of a deceased person is given to the clerk of the court of the proper county alone. C. S., 1. *Bank v. Commissioners of Yancey*, 678.

EXECUTORS AND ADMINISTRATORS—*Continued.*

b Persons Appointed by Trial Court to Settle Estate are Trustees

1. A consent judgment entered by the court in the action of the beneficiaries of a deceased person, some claiming under an alleged will and the others as heirs at law, disposing of the estate, and therein naming those to act thereunder, does not constitute those named therein as administrators, and they will be regarded as trustees or agencies to carry out the provisions of the consent judgment. *Bank v. Commissioners of Yancey,* 678.

EXPERT TESTIMONY see Evidence E.

FALSE PRETENSE.

A Elements of Crime.

a Fraudulent Intent

1. In order to constitute false pretense in the discounting a note at the bank by a maker upon misrepresentation to one of the endorsers that he had secured certain endorsers with him, when, in fact he had used the note without other endorsers, evidence that the maker had turned over to the endorsers on the note his entire stock of merchandise and that he had thereupon had a civil judgment in their favor canceled of record, is material and competent upon the element of intent necessary to constitute the offense charged, and it is reversible error for the judge to reject evidence to this effect. C. S., 4278. *S. v. Johnson,* 506.

FEDERAL COURTS see Courts B.

FORECLOSURE see Mortgages.

FORMER JEOPARDY see Criminal Law G.

FRAUD (Fraud as Affecting Bills and Notes see Bills and Notes B—in Procurement of Release from Liability for Negligent Injury see Release A a).

A Pleading.

a Sufficiency of Allegations

1. When fraud is relied on to convert, in equity, a deed which upon its face conveys an absolute fee-simple title to lands into a mortgage, the fraud must be alleged in the pleadings with sufficient certainty and fulness to indicate to the opposing party what he is called upon to answer. *Waddell v. Aycock,* 268.

B Burden of Proving Fraud.

1. The burden of proof is on defendant to show fraud as a defense to an action upon his note when this is relied upon by him. *Peyton v. Griffin,* 685.

C Misrepresentation Alone Insufficient to Constitute Fraud.

1. Where one acting for the sale of land for the owners has informed the prospective purchaser that he had not been upon the *locus in quo* previously, and gives mistaken boundaries, which thereafter the proposed purchaser has had ample opportunity to verify, the mere fact of the misrepresentation is not sufficient, in the action by the holder of a note for a part of the purchase money, to raise the issue of fraud set up in defense to the action. *Peyton v. Griffin,* 685.

FRAUD—*Continued.*

D Defense to Actions for Fraud.

a Ratification of Fraud

1. *Held*, under the facts of this case, involving the question of fraud in the purchase of a diamond ring, evidence of the ratification of the fraud was sufficient to take the question to the jury. *Abel v. Dworsky*, 867.

FRAUDS, Statute of see Deeds and Conveyances A b—Admissibility of Parol Evidence to Explain Writing see Evidence C a 1.

FRAUDULENT CONVEYANCES.

A Remedies of Creditor.

a Allegation Necessary to Set Aside Conveyance

1. In order for a creditor of a husband to set aside a gift to his wife as fraudulent against creditors, his complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer thereto is good. *Wallace v. Phillips*, 665.

B Rights of Grantee Without Knowledge.

1. A contract made in consideration of support by the son of his father and mother for life for one hundred dollars and certain shares of stock of the father, of the value of seven thousand dollars, and the father has not retained sufficient property out of which to pay his then existing creditors, and the son has acted in good faith without notice or knowledge, the transfer of the stock to the son is not valid as against his father's creditors beyond the amount he has previously expended for the support, and for which he was liable under the terms of the contract, and where issues raising this question have been tendered, refused, and exceptions entered, and this phase of the evidence in the case has not been presented to the jury, a new trial will be ordered on appeal. C. S., 1009. *Bank v. Mackorell*, 741.

2. When the father has entered into a contract with his son for support of himself and wife for life, and gives as a consideration certain of his property, without retaining sufficient property to pay his then existing creditors, and the pleadings and evidence raise the question of the son's good faith and part performance without notice, these questions should be submitted to the jury upon appropriate issues. *Ibid.*

FRAUDULENT INTENT see False Pretense A.

"FULL FAITH AND CREDIT" see State A a 1, 2.

GAMBLING.

A Actions to Recover on Check Given for Gambling Debt.

1. An action will not lie to recover against the maker upon a note given for a gambling debt. *Moore v. Schwartz*, 549.

GENERAL APPEARANCE, what constitutes see Appearance A.

GUARDIAN AND WARD (Guardian of Insane see Insane Persons).

A Care of Ward's Estate.

a Liability of Guardian

1. In the investment of funds belonging to his ward, the guardian is not liable for a loss to the estate by reason only that he has not followed the statutory directions in making the investments, if he has exercised a sound discretion commensurate with his duties, and good faith upon inquiry, and caution, to the interest that the *corpus* of the estate be preserved and a reasonable income, as required by law, be provided for his ward; and when statutory requirements as to the kind and nature of the investments has been followed, to attach a personal liability on him, or liability on his surety, it must be made to appear that he acted in fraud or gross negligence in respect to the duties the law imposes on him. *Sheets v. Tobacco Co.*, 149.

b Liability of Third Parties

1. The liability of a guardian for an investment of funds of his ward in preferred stock of a private corporation, is primary, and must be established before a judgment against the corporation for selling the stock and accepting payment with the knowledge that the guardian had therein wrongfully used funds belonging to the ward's estate. *Sheets v. Tobacco Co.*, 149.

GUARDIANSHIP OF INSANE PERSONS see Insane Persons A.

HEALTH see Sanitary Districts, Constitutional Law C a.

HIGHWAYS (Right of Taxation for Construction in Wake see Taxation B a 3—Bonds for Construction of Highways see Principal and Surety A d.

A State Highway Commission.

a Powers of Commission in Taking Over County Roads

1. The creating of the State Highway Commission and the giving it authority for the creation, maintenance, etc., of a State-wide system of public roads, and the amendatory act providing for the taking over, within certain limits, county highways, or parts thereof as links in the State-wide system, and for the coöperation of the State Highway Commission in such case with the road-governing body of a county for the mutual benefit of both the county and the State, are statutes to be construed together *in pari materia. Road Comrs. v. Highway Commission*, 26.

2. The provision in the statute amending the State Highway Commission Act that the State Highway Commission in taking over a county road as a link of the State system of public highways coöperate with the road-governing body of the county for the best interests of both the State and the county does not impair the large discretionary powers given by statute to the State Highway Commission, acting in good faith, and when it is found as a fact in the lower court that they have so coöperated, the decision of the State Highway Commission in selecting a different route than the one fixed upon by the county authorities, cannot be disturbed by the courts. *Ibid.*

HIGHWAYS—*Continued.*

3. Section 7, ch. 46, Public Laws 1927, giving to the road-governing body of a county alone the right to object to a change in the route of an existing State highway, taken over by the State Highway Commission, with certain provisions as to procedure on appeal, and prohibiting certain persons, corporations, or municipal corporations from maintaining any action in the courts in respect thereto, is constitutional and valid, and does not deprive such persons, etc., of any vested right; and this result is not affected by the fact that the county had advanced money to construct the original road, as allowed by law. *Parker v. Highway Commission*, 783.

4. It is within the discretion of the road-governing body of a county to object or not, to the partial change by the State Highway Commission to the road adopted by it as a part of the State system of public highways under the procedure specified by the statute, and their action is not subject to review in the courts, either with respect to a protest or an appeal to the full board of the State Highway Commissioners from the determination of the special committee appointed to investigate the question and determine it preliminarily. *Ibid.*

b Actions on Contract for Construction of Roads

1. A claim against the State Highway Commission for damages arising from an alleged breach of contract in the building of a State highway is a claim against the State, but when the only issues presented therein are ones of fact, the Supreme Court will not exercise its recommendatory original jurisdiction, and the action will be dismissed. *Lacy v. State*, 284.

2. A provision in the contract made by the State Highway Commission for the construction of a State highway that all disputes and misunderstandings between the parties in relation to its performance be referred to the engineer in charge of the work is valid and binding. *Ibid.*

3. A contract made with the State Highway Commission for the building of a certain length of designated highway, for a certain sum, payable in monthly installments, within a time limit, with certain provisions for extension of time under certain conditions, and giving the Commission, through the State Engineer, the power to annul the contract under conditions showing that the work as then prosecuted would not be completed within the time limit, is an indivisible contract, giving the contractor the right to complete his contract after he has partially done so, and except by complying with the statutory provisions as to giving him notice of the unsatisfactory progress of the work by the State Engineer, upon the conditions imposed, the contractor is entitled to recover upon a counterclaim, in the suit of the Commission, the profits he would have made upon the work left incompleted, upon the giving of the work to another contractor. *Highway Commission v. Rand*, 799.

4. Where the right to terminate a contract for the construction of a State highway, made with the State Highway Commission, is given to the State Engineer, it must be exercised by him in accordance with the terms of the contract, and not by a subordinate engineer. *Ibid.*

HIGHWAYS—*Continued.*

B Injuries to Persons on Highways.

a Negligence in Upkeep, Repair, Obstructing, etc.

1. Evidence tending to show that the defendant contractor for the building of a county highway suddenly turned the course of the old road at right angles at a railroad cut, leaving it without guard or signal to warn against danger, and that the plaintiff's intestate, traveling in an automobile at night ran off the edge of the cut and was killed is sufficient evidence of defendant's negligence to uphold the verdict in plaintiff's favor. *Furlough v. Highway Commission*, 365.

HOMESTEAD.

A Effect of Transfer of Encumbrance or Right Thereto.

1. The owner of lands loses his right to a homestead therein allowed by our Constitution, Art. X, sec. 2, upon his conveying the title to the same by deed, though he may select a homestead thereafter in other of his lands under the provisions of our statute. C. S., 729. *Duplin County v. Harrell*, 445.

B Homestead May be Claimed in Equity of Redemption.

1. A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Const., Art. X, secs. 2, 8; C. S., 728, 729, 730, 731, 745. *Cheek v. Walden*, 752.

HOMICIDE.

A Degrees of Homicide.

a Instructions as to Degrees

1. Where a defendant is convicted of manslaughter, error in the charge on the question of murder in the second degree is cured by the verdict, and will not be considered on appeal. *S. v. Leonard*, 242.

2. Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. C. S., 4642. *S. v. Newsome*, 552.

B Manslaughter.

a Degree of Negligence Constituting Criminal Negligence

1. The degree of negligence necessary to be shown to convict the defendant of criminal negligence in causing the death of one upon the

HOMICIDE—*Continued.*

highway by the driving his automobile thereon is such recklessness or carelessness as is incompatible with a proper regard for human life. *S. v. Leonard,* 242.

b Evidence

1. The statute requiring those driving automobiles to keep on the right-hand side of the center of the highway went into effect 1 July, 1927, and upon the trial for manslaughter, for the negligent killing of a pedestrian occurring prior to that time, it is reversible error for the judge to instruct the jury as to this requirement for their consideration in reaching a verdict under evidence tending to show the defendant's violation thereof. *S. v. Toler,* 481.

2. An ordinance of the State Highway Commission as to the safety of the road, when bearing upon the question of the defendant's guilt under an indictment of manslaughter arising from the alleged negligent driving on the State highway, must be properly introduced in evidence in order to support an instruction thereon by the judge. *Ibid.*

c Instructions.

1. Where the defendant is criminally indicted for the killing of the deceased in a collision on a public highway by the reckless driving of his car, an instruction upon conflicting evidence is correct, and not prejudicial to the defendant, that he would not be guilty if another was driving the car who was not doing so under his direction or control, and the contrary was to be shown beyond a reasonable doubt by the State. *S. v. Leonard,* 242.

d Motion of Nonsuit.

1. When the defendant on trial under a criminal indictment for recklessly driving his car and colliding with another car in which deceased was riding, on a public highway, causing her death, and there is both direct and circumstantial evidence that the defendant was driving the car at the time, which his own testimony and evidence of his witnesses contradicts, his motion as of judgment of nonsuit made at the close of the State's evidence and renewed after all the evidence, is properly denied. C. S., 4643. *S. v. Leonard,* 242.

HUSBAND AND WIFE (Husband Estopped to Deny Gift to Wife see Partition A b 2—Setting Aside Gift to Wife see Fraudulent Conveyances A a 1).

A Abandonment.

a Liability of Husband to Guardian for Support of Abandoned Wife and Children

1. Where the owner of lands living thereon abandons his wife and children, and leaves the State, and his wife and children without support, and another took and supported them, and has purchased the lands from the purchaser under an execution sale, taking deed with full covenants and warranty of title, upon the return of the execution debtor and his successfully maintaining his suit to have the deeds declared void: *Held,* the one who took and supported them is entitled in the settlement to the money he has reasonably ex-

HUSBAND AND WIFE—*Continued.*

pended for the support and maintenance of the wife and children, and this may be set up as a counterclaim against a recovery for the rents and profits, and judgment may be rendered in the same action (C. S., 456, 507, 519, 521, 522), C. S., 4445 and amendment; C. S., 1667. *Jeffreys v. Hocutt*, 339.

B Separation.

a Relinquishment of Inchoate Right of Curtesy After Separation

1. Where a contract of separation has been made by husband and wife after the occurrence of the separation, in which the former gives the latter a quitclaim deed to his inchoate right of curtesy, a deed to the land from the wife to another passes the title free from the claim of curtesy therein by the husband. *McLeod v. McNeill*, 422.

C Wife's Separate Estate.

a Trust Engrafted in Favor of Wife on Lands Purchased by Husband with Money Belonging to Her Separate Estate

1. A trust is engrafted on the title of the husband in favor of the wife when he has acquired lands by deed taken to himself with money belonging to her separate estate. *Marshall v. Hammock*, 498.

ILLEGITIMATE CHILDREN, Right to Inherit see Descent and Distribution B a—Right to Recover on Contract with Putative Father see Contracts D c 1.

INDICTMENT (for Larceny see Larceny A—for Embezzlement see Embezzlement A).

A Form, Requisites and Sufficiency Thereof.

1. An indictment for a criminal offense is ordinarily sufficient if it uses the descriptive words given in the statute applicable as constituting the offense, or substantially so many of them as will enable the court to determine the one on which it is founded. *S. v. Maslin*, 537.

2. An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions, does not require the solicitor to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. C. S., 4622. *S. v. Charles*, 868.

INFANTS GUILTY OF CONTRIBUTORY NEGLIGENCE see Negligence D a.

INHERITANCE TAX—Jurisdiction of Federal Courts on Tax Levied by State see Courts B a—Original Jurisdiction of Supreme Court in Action to Recover see Courts A b 2.

INJUNCTIONS (Questions Reviewable on Appeal see Appeal and Error A b 1—on Foreclosure of Mortgage see Mortgages A a 2, 3, 4; C b).

A Continuing to Hearing.

a Grounds for Continuing

1. When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting

INJUNCTIONS—*Continued.*

evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. *R. R. v. Transit Co.*, 305.

INSANE PERSONS.

A Guardianship.

a Rights of foreign guardian in this State

1. Where under proceedings duly had in another State under an inquisition for lunacy, a person has been declared insane and a guardian of his person and property has been therein had, and in the exercise of the authority thus derived, the guardian has had his ward confined in an asylum in this State as being best suited to the cure and well being of his ward: *Held*, our courts in recognition of the Federal comity laws may, as a matter of comity, uphold here the relationship of guardian and ward, and the exercise of the guardian's reasonable judgment in confining his ward in the private institution of our State, there being nothing contrary to our public policy, good morals or natural justice or against our statute or organic law in so doing. *In re Chase*, 143.

2. The proceedings in another State declaring a person insane is a determination of status, and when such proceeding is according to the law of the other State, the status, as declared, will usually be upheld in this State, as a matter of general recognition. *Ibid.*

INSOLVENTS see Receivers B.

INSTRUCTIONS see Trial A—in Action by Servant for Injuries see Master and Servant B a 4—in Railroad Negligence Cases see Railroad A a 4—in Lessor's Action for Breach of Lease Contract see Landlord and Tenant A f—in Criminal Actions see Criminal Law B—in Proceedings of Probate see Will C a 1.

INSURANCE (Statute Relating to Retaliatory Tax on Foreign Insurance Companies see Statutes B 3).

A Contract in General.

a Nature, Requisites, and Validity

1. A stipulation in a policy of life insurance that it will not be valid until its delivery and the first premium paid, is valid and enforceable. *Sturgill v. Ins. Co.*, 34.

B Agent of Insurer.

a When his Acts Create Liability of Insurer

1. When the local agent of an insurance company has notified the applicant for a life insurance policy that the policy was ready for delivery, which, under its terms, was to be effective from its delivery and payment of the first premium, and is informed, in reply, that he would not be able to pay the premium until a certain date, and thereafter he was killed in an accident covered by the policy, without having either paid the premium or arranged with the insurer therefor or accepted the policy; and there is no evidence that the

INSURANCE—*Continued.*

agent had been negligent in delivering the policy: *Held,* a judgment in plaintiff's favor in the beneficiary's action on the policy will be reversed on appeal. *Sturgill v. Ins. Co.,* 34.

C Disability Clauses.

a Burden of Proving Disability

1. Where under a clause in a policy of insurance there is a provision for paying the insured a certain amount monthly in the event the insured furnish proof that a total disability of his earning capacity exists, which he furnishes, and the insurer accepts and pays the stipulated amount, and thereafter upon a certificate of his physician the insurer ceases payment for the cessation of such disability: *Held,* the burden of proof is on the insured to show his continued disability within the terms of the policy. *Fields v. Assurance Co.,* 262.

b Questions for Jury

1. Where there is conflicting evidence that the insured is permanently disabled under a clause in his policy of insurance paying him a certain monthly sum during disability, the issue is for the jury to determine. *Fields v. Assurance Co.,* 262.

2. Under the terms of a policy of insurance providing for payment to the insured of certain sums of money in the event of his becoming wholly disabled by bodily injury or disease so as to render him permanently, continuously incapable of pursuing any and all gainful occupation: *Held,* the evidence in this case sufficient to sustain the verdict in favor of the insured, and overrule the defendant's motion as of nonsuit. *Brinson v. Insurance Co.,* 332.

c Physicians Certificate Does Not Bar Insured's Right of Action

1. The fact that the certificate of a physician given under the requirements of a disability clause in the policy would reasonably cause the insurer to discontinue payment, does not bar the insured's right to show that his disability still exists. *Fields v. Assurance Co.,* 262.

D Liability of Insurer.

a Burden of Proof in Action Against Insurer

1. Where the period covering the liability of an insurance company for theft of an automobile expires at noon of a certain day, the burden of proof is on the plaintiff in his action to show that the theft occurred before the date named, and evidence that raises a mere conjecture is not sufficient to resist defendant's motion as of nonsuit. *Matthews v. Insurance Co.,* 374.

INTEREST.

A Time and Computation.

a Time from Which Interest Runs on Judgments

1. When a real estate man is entitled to recover a reasonable amount for his services rendered in securing a tenant for a building, the sum fixed by the verdict will, as a matter of law, draw interest from the time the same was due and payable. C. S., 2309. *Thomas v. Realty Co.,* 591.

INTEREST—*Continued.*

2. When interest is recoverable on amount of verdict, it will run from the date of the verdict, unless it can be legally determined before then. C. S., 2307. *Ludford v. Combs*, 851.

INTOXICATING LIQUOR.

A Possession.

a Burden of Proving Possession Lawful Under Statutory Exceptions—Possession Prima Facie Case

1. Where the State has introduced evidence tending to show the unlawful possession of intoxicating liquor by the defendant, making out a prima facie case of its being for an unlawful purpose, the burden of proof is on the State to show guilt of defendant beyond a reasonable doubt, and the defendant is required to show that his possession was within the statutory exception. *S. v. Dowell*, 523.

2. Under 3 C. S., 3411(j), making the possession of intoxicating liquor prima facie evidence of unlawful purpose, the State is not required to allege or prove that the case does not fall within the exception of 3 C. S., 3411(j), allowing possession in a man's dwelling for his personal use, the use of his family, or the entertainment of his bona fide guests therein, this being a matter of defense, must be alleged and proven by the defendant. *Ibid.*

B Purchase.

a State Must Prove Purchase Made Within Two Years

1. On the trial of a criminal action the State has the burden of showing defendant's guilt beyond a reasonable doubt, and where the defendant, a witness in his own behalf, indicted under our prohibition statute, admits that he has made a purchase of whiskey, but does not state when or where, the burden is on the State to show that the purchase was made within two years, and made within the State, and an instruction directing a verdict on the issue against the defendant is reversible error. *S. v. Johnson*, 657.

C Trial.

a Nonsuit

1. Where intoxicating liquor is found in the possession of the defendant, and he does not take the witness stand or offer evidence to prove himself within the exception relating to possession in his dwelling for his personal use allowed by the only exception to the statute, and the State has made out a prima facie case of possession, a motion as for nonsuit is properly overruled. C. S., 4643. *S. v. Dowell*, 523.

b Evidence

1. Where on a trial for the purchase of intoxicating liquor the defendant admits the purchase, but does not state where or when the purchase was made, the exclusion of evidence offered by the defendant, which might have shown that the purchase was not made within two years, or made within the State, is reversible error. *S. v. Johnson*, 657.

c Instructions

1. Where under an indictment for the purchase of intoxicating liquor, the State fails to prove the purchase within two years, the failure

INTOXICATING LIQUOR—*Continued.*

of such proof should be taken advantage of by the Defendant by a request for an instruction directing a verdict in his favor. *S. v. Johnson*, 657.

D Searches and Seizures.

a When Search Warrant Necessary

1. A search warrant is not necessary to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when under the circumstances the officer had reasonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of section 6, ch. 1, Public Laws 1923. *S. v. Jenkins*, 747.

ISSUES—in Caveat Proceedings see Wills D a—of Primary and Secondary Liability see Torts A, Master and Servant A b 1—in Libel and Slander Actions see Libel and Slander C a 1—in Action on Note see Bills and Notes C a—Evidence Competent on One Issue see Evidence A d.

JOINT TORT-FEASORS see Torts A.

JUDGES (Power to Extend Time for Service of Case on Appeal see Appeal and Error F a—Power to Extend Time for Filing Pleadings see Pleadings C a—Power to Set Aside Judgment see Judgments C a—Power to Change Award see Arbitration and Award B 1).

A Rights, Powers and Duties.

a Superior Court Judge May Not Hear Motion to Set Aside Final Order of Another

1. Where an order of the judge of the Superior Court is finally determinative of the rights of the parties, it may not be considered by another Superior Court judge upon motion to set it aside, such power existing only as to interlocutory orders. *Broadhurst v. Drainage Commissioners*, 439.

b Power to Issue Supplementary Order Pending Appeal Within Discretion

1. Where an appeal has been taken from a judgment of the Superior Court judge, vacating a restraining order upon the county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal is within the sound discretion of the trial judge, and not reviewable. 3 C. S., 858(a). *Clark v. McQueen*, 714.

JUDGMENTS—(Status of Erroneous Judgment of Removal see Removal of Causes A—Setting Aside for Surprise, Excusable Neglect, etc., in Removal of Causes see Removal of Causes B a 1—Interest on Judgments see Interest.)

A Conclusiveness of Adjudication (in Partition Proceedings see Partition A b).

a Matters Concluded

1. A prior judgment is an estoppel to all subsequent actions as to the issues adjudicated, but not as to issues which might have been included in the prior action, but were not. *Moses v. Town of Morganton*, 92.

JUDGMENTS—*Continued.*

2. The city board of adjustment, on appeal from the action of the building inspector as to issuing a permit to erect a gasoline filling station in a certain part of the city, determines the matter upon the facts presented in a *quasi*-judicial capacity, and the doctrine of *res adjudicatur* applies upon a subsequent presentation to them of the issuing of the permit upon the same lot under substantially the same conditions. *Little v. Raleigh*, 793.

b Persons Concluded (by Caveat Proceedings see Wills D b).

1. A judgment in a suit to enjoin the foreclosure sale under mortgage against the administrator of the deceased mortgagor is not *res adjudicata* as to the heirs at law of the deceased who have not been made parties. *Meadows Co. v. Bryan*, 398.

B On Trial of Issues.

a Conformity to Verdict

1. Where the wife's cross-action for divorce *a mensa* is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a divorce absolute upon consent of the parties, the judgment is a nullity; and upon the husband's death the wife is entitled to her dower allowed by statute. C. S., 1662. *Saunderson v. Saunderson*, 169.

2. Where a judgment is entered in a suit for a divorce contrary to that permissible by the verdict, the consent of the parties thereto cannot confer jurisdiction or render the judgment valid. *Ibid.*

b Judgment May be Signed Few Days After Rendition

1. Where the judge, by consent, has heard a motion in a civil action, to set aside a judgment for want of service on the defendant, on supporting evidence sufficient in law, his action in so doing will not be disturbed on appeal when it is made to appear that he had awarded his decision at the time of hearing the motion and signed the judgment in conformity therewith a few days later, at a criminal term of court. *Trust Co. v. Nowell*, 449.

C Setting Aside for Surprise, Excusable Neglect, etc.—(in Removal of Causes see Removal of Causes B a 1).

a Requisites for

1. In order for the trial judge to set aside a judgment of the clerk of court, for default of an answer, C. S., 600, the judgment in question must be a valid one, and regularly entered. *Abbitt v. Gregory*, 203.

b Questions Reviewable on Appeal from Order Setting Aside

1. Where there are no exceptions to the evidence introduced, the facts found thereon are conclusive on appeal to the Supreme Court, and the judges' conclusions of law are alone reviewable on appeal from an order setting aside a judgment on the grounds of the defendants' mistake, surprise, or excusable neglect. C. S., 600. *Abbitt v. Gregory*, 203.

c Power of Trial Court to Set Aside

1. Upon a proper finding of a meritorious defense and excusable neglect, the judge of the Superior Court, on appeal from the clerk, has au-

JUDGMENTS—*Continued.*

thority to set aside a judgment rendered by the clerk, against the defendant by default of an answer, to which exception has been duly entered, before the clerk, C. S., 600; and to permit an answer to be filed, C. S., 536. *Dunn v. Jones*, 354.

D Judgments *Non Obstante Veredicto.*

a Nature in General

1. Under the modern practice a judgment *non obstante veredicto* is only granted in favor of either party to the action only upon the insufficiency of the pleadings. *Jernigan v. Neighbors*, 231.

E Setting Aside for Irregularity.

a Grounds Therefor

1. A judgment by default final entered upon the pleadings for the want of an answer, when it is made to appear on appeal that one by default and inquiry should have been entered, is an irregular judgment, but on defendant's motion to set it aside, he must show a meritorious defense. *Baker v. Corey*, 299; *Supply Co. v. Plumbing Co.*, 629.

2. Where the clerk of the court has entered an irregular judgment of default final for the want of an answer to the complaint, and the trial judge has set it aside on that ground alone; and on appeal to the Supreme Court it does not appear that the question of a meritorious defense was considered or passed upon, and that the movant intended to allege one, the case will be remanded for the determination of this question as to whether the defendant has such meritorious defense as calls for the vacating of the judgment of the clerk of the court. *Baker v. Corey*, 299.

F Setting Aside for Void Service of Summons.

a Degree of Proof Required

1. Where the summons in an action has been duly served on a party defendant by a proper process officer, it imports verity, and will not be set aside and a judgment vacated in the absence of clear and unequivocal proof that the summons had not in fact been served, and such proof must be more than the one affidavit by the defendant. C. S., 921. *Trust Co. v. Nowell*, 449.

2. The return of process regularly showing service by the court's appropriate officer cannot be overthrown by the testimony of a single witness. *Glass v. Moore*, 871.

G By Default. (Jurisdiction of Clerks to Render see Clerks of Court A a.)

a When Judgments Should be by Default Final and When by Default and Inquiry

1. A judgment by default final may be rendered by the clerk on failure of the defendant to answer where the complaint sets forth one or more causes of action, each consisting of a breach of an expressed or implied contract to pay a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. *Baker v. Corey*, 299.

JUDGMENTS—*Continued.*

2. In order for the plaintiff to be entitled to a judgment by default final upon the complaint for the want of an answer in his action to recover from the estate of the deceased for services rendered before her death, in taking care of and providing a support for her, at her request and promise to pay for them, there must have been a definite price fixed upon and understood and agreed to by both of the parties; and where the complaint alleges merely an estimate by the parties of a reasonable price to be paid for such services it supports a judgment by default and inquiry only. *Ibid.*

3. A judgment by default final is irregular when rendered for the want of an answer filed in an action upon contract for goods sold and delivered when the alleged cause, as appearing from the complaint, is not upon an expressed contract, but for the reasonable value of the goods, in which event a judgment by default and inquiry is the proper one, unless it is made to appear that the defendant has by his acts or conduct or in some recognized legal way admitted owing the amount in suit. *Supply Co. v. Plumbing Co.*, 629.

H Priority.

a Between Judgment Lien and Mortgage

1. Where there is a recorded judgment, C. S., 614, and thereafter the judgment debtor executes a mortgage on certain of his lands, and the land is foreclosed under a prior mortgage antedating the judgment, and the judgment debtor makes no claim to his homestead, the judgment creditor has a preference in the proceeds of the sale over the mortgage made subsequent to the judgment. *Duplin County v. Harrell*, 445.

I Property Subject to Judgment Liens.

1. Where a judgment debtor has lost title to lands by adverse possession of another, C. S., 430, prior to the acquisition and registration of the judgment, the judgment creditor is not entitled to execution on the *locus in quo*, the judgment debtor having no title at the time of the judgment, and this result is not affected by the giving of a deed by the debtor to the claimant, which was not registered until after the judgment. C. S., 614; C. S., 428, 3309, known as the Connor Act, have no application. *Johnson v. Fry*, 832.

JURISDICTION OF SUPREME COURT see Courts A—by Consent of Parties see Judgments B a 2.

JURY—(Trial by Jury in Eminent Domain Proceedings see Eminent Domain—Verdict see Trial D).

A Challenges.

a Number of Challenges and Parties Entitled Thereto

1. When two defendants are sued for damages in negligently causing a death, the decision of the trial judge is final as to the interest of each defendant and the number of challenges to the jury allowable to each. C. S., 2331, 2332. *Ramsey v. Power Co.*, 788.

JUSTICES OF THE PEACE—Right to Continue Case see Malicious Prosecution A 1.

LABORERS AND MATERIALMEN, Rights Against Surety for Municipal Construction see Principal and Surety A b, A d.

LANDLORD AND TENANT.

A Leases (by Trustee see Trusts C a—by Receiver see Receivers C a).

a Surrender by Operation of Law

1. Where a lessee wrongfully breaches his contract by failing to enter and take possession under a lease on a building especially constructed for him, and the lessor, with the intent to diminish the damage, rightfully reënters the premises and rents it to another, he acts in trust for them both, and there is no surrender of the lease by operation of law, and the lessee is liable for damages. *Monger v. Lutterloh*, 274.

2. Where a lessee wrongfully refuses to take possession of leased realty, and the lessor rightfully reënters and leases to another, there is a presumption of law that the lessee surrenders the property and that the lessor accepts the surrender; but this presumption is rebuttable by evidence of the intent of the parties as expressed in the lease, and by their words and acts. *Ibid.*

b Measure of Damages in Action for Breach of Lease Contract

1. Where the lessee of a hotel has wrongfully breached the terms of the lease, and the lessor has rightfully reëntered for the purpose of diminishing the damages thus caused, and is entitled to recover them in his action; the rule of recovery is the rental value for the unexpired term as fixed by the contract, diminished by the fair rental value in the open market. *Monger v. Lutterloh*, 274; *Womble, Admx., v. Leigh*, 282.

c Burden of Proving Possibility of Minimizing Damages

1. Where the lessee has wrongfully breached his contract of lease, and the lessor brings his action for the resulting damages based upon the rental value as fixed by the lease, the burden is on the defendant to show that in the exercise of good business prudence the lessor could have leased to another and minimized the damages, and the amount thereof. *Monger v. Lutterloh*, 274.

d Termination, in General

1. A written contract of lease of lands will ordinarily be construed to remain in force until it is rescinded by the mutual consent of the parties, or until the party claiming under it does some act inconsistent with the duty imposed on him by the agreement that amounts in law to a surrender on his part, and an acceptance of such surrender by the other party. *Monger v. Lutterloh*, 274.

e Statutes Thereon

1. The notice to the lessor required to be given by the lessee before terminating his lease, where a definite time is fixed for the payment of a stipulated rent, C. S., 2343, is for the benefit of the lessor, and to be declared only at his application, and does not apply to the facts of this case. *Monger v. Lutterloh*, 274.

f Instructions in Action for Breach

1. Where the lessor has rightfully reëntered the leased premises and is entitled to recover damages from the lessee in his action, an instruc-

LANDLORD AND TENANT—*Continued.*

tion that diminishes the damages to the extent the lessor, in possession and operating the same, should reasonably have received in the exercise of good business judgment, is reversible on appeal. *Womble v. Leigh*, 282.

g Termination by Provisions in Contract

1. A provision in a contract of lease rendering the contract void in the event the premises are rendered unfit for the purpose for which it was leased by fire or otherwise is enforceable according to the tenor of the written contract, and it is reversible error for the judge to instruct the jury otherwise, and submit the question to the jury as to the reasonableness of the time in which the lessor may have to make proper repairs after the fire occurred that had rendered the premises unsuitable. *Ragan v. Lebovitz*, 616.

B Enjoyment and Use of Premises.

a Tenant's Right of Action Against Third Parties for Injury to Crops or Premises

1. Broom sage growing upon leased farm land, not requiring cultivation, is not regarded as *fructus industriales* or in the nature of personal property belonging to the tenant, except as to so much as may be required by him in connection with the use of the land; and where the land has broom sage growing thereon, he is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except only for its value for farming purposes on the leased premises. *Chauncy v. R. R.*, 415.

C Rents and Advancements.

a Liens

1. Where a landlord furnishes his tenant advancements for the making of crops, the lien for the rent and for advancements are in equal degree, and now attach, since the amendment of C. S., 2480, by chapter 302, Public Laws 1925, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next. *Brooks v. Garrett*, 452.

LARCENY.

A Indictment.

a Variance Between Proof and Indictment

1. Where an indictment alleges the larceny of certain goods as the property of a certain person, proof that it was that of a different person is a fatal variance from the allegation of the indictment, and the action will be dismissed with leave of the solicitor to draw another bill. *S. v. Harris*, 306.

B Evidence.

a Sufficiency

1. Under counts in an indictment charging the defendant with feloniously stealing, taking, and carrying away articles of merchandise from a storehouse and with receiving stolen goods, etc., evidence is sufficient to resist his motion as of nonsuit which tends to show

LARCENY—*Continued.*

that some of the identified merchandise was found in a woods near a public road, and that the defendant and two others went to the place in an automobile, and that the defendant waited in the automobile while the two others brought the merchandise from its place of concealment to the automobile. *S. v. King*, 621.

LAST CLEAR CHANCE see Railroads A a 6.

LAW OF CASE see Appeal and Error B a 2.

LEASES see Landlord and Tenant A.

LEGISLATIVE POWERS see Constitutional Law A a—of Taxation see Taxation B b 1, 3.

LEVY AND ASSESSMENT OF TAXES see Taxation.

LIBEL AND SLANDER.

A Words Actionable Per Se.

1. When the false and defamatory words spoken of and concerning the plaintiff, the subject of his action for slander, are to the effect that he had been stealing and that he should be put in the penitentiary, they are actionable *per se*, not requiring evidence of special damages, and from this publication the law implies malice, and the jury may award compensatory damages. *Ferrell v. Siegle*, 102.

B Punitive Damages.

a Requisites For

1. In order for the jury to award punitive damages in an action for slander, the utterance of the false words of and concerning the plaintiff must have been with actual malice or ill-will, or uttered under such circumstances as to show a total disregard of the plaintiff's rights in the enjoyment of his reputation. *Ferrell v. Siegle*, 102.

C Actions of.

a Issue of Punitive Damages Must Be Tendered

1. Where the defendant in an action for slander desires, under the allegations and evidence, an issue as to punitive damages submitted to the jury, he should aptly tender it, and where only a single issue as to damages is submitted, without his objection, and the amount of the verdict is within that demanded for actual damages, supported by the evidence, it is not reversible error for the trial judge to render his judgment accordingly. *Ferrell v. Siegle*, 102.

D Qualified Privilege.

a Nature and Limitation of Privilege

1. Qualified privilege cannot successfully be pleaded as a bar to an action for slander when the fact is established that the defamatory words were untrue and maliciously spoken. *Newberry v. Willis*, 302.

2. A bank in good faith marking a check "signature forged," and refusing payment on this ground, acts within a qualified privilege, and is not liable in damages to the drawer thereof. *Fields v. Trust Co.*, 304.

LICENSE—Necessity for to Sell Stock in Prospective Corporation see Corporations B a.

LIENS—Drainage Liens see Drainage Districts—for Rents and Advancements see Landlord and Tenant C a.

LIFE INSURANCE see Insurance.

LIMITATION OF ACTIONS (on Foreclosure see Mortgages C a—to Recover Realty see Adverse Possession).

A Statute of Limitations.

a Claim of Damages for Taking Property Under Eminent Domain

1. The plea of the statute that the owner of lands make claims for damages of a county road commission for the taking of his property for a highway is not available to the board when its conduct and dealings with the plaintiff has rendered it inequitable. *Gaddis v. Road Commission*, 107.

b On Equitable Relief for Fraud, Mistake, etc., and to Convert Fee into Mortgage

1. Where under the rule in *Shelley's case* a devisee takes the fee-simple title to lands, a suit for equitable relief on the ground of fraud or mistake is barred by the lapse of three years, and one to convert the fee-simple title into a mortgage within ten years after the right of action accrued when the alleged mortgagee is in possession. *Waddell v. Aycock*, 268.

c In Action to Declare Resulting Trust

1. Where the plaintiff as heir at law of his mother seeks to engraft a trust in her favor on the title to lands taken by his stepfather, and purchased with the money belonging to her, as against the children of his mother's second marriage, and it appears that the *locus in quo* had been divided between the children of both marriages by proceedings for partition as tenants in common, and the plaintiff had purchased for a valuable consideration a part of the lands so allotted to another of the tenants, and the lands were thereafter so held peaceably and adversely for more than ten years, C. S., 445, and for the same period of time after the trust had been disclaimed by the alleged trustee: *Held*, the plaintiff is estopped by his laches from claiming an undivided interest in the tract as the heir at law of his deceased mother. *Marshall v. Hammock*, 498.

2. *Held*, under the facts of this case, the general statute of limitations, C. S., 445, being applicable to the plaintiff's right of action to declare a trust, the principle that acquiescence cannot confirm a title has no application. *Ibid.*

B Computation of Period of Limitation.

a Continuation of Action Nonsuited

1. The question as to whether an action is a continuation of a former one so as to bring it within the provisions of C. S., 415, allowing the same to be brought one year from nonsuit, in relation to the statute of limitations, is one of law to be decided from the original complaint, and when no complaint is filed in the prior action, the identity of the causes of action may not be shown by parol evidence. *Motsinger v. Hauser*, 483.

LIMITATION OF ACTIONS—*Continued.*

C Acknowledgment, New Promise, and Part Payment.

a Effect of Sale of Collateral by Creditor and its Application on Debt

1. The statute of limitations of actions will bar a recovery against the maker of a note, endorsed by another, after three years from the time he has denied making it, irrespective of the time of payments endorsed thereon from the sale of shares of stock therein pledged as collateral. *Coburn, Receiver, v. Barnhill,* 239.

LIS PENDENS—Proceedings for Torrens Deed as Lis Pendens see Deeds and Conveyances E a.

MAIL, Presumption of Receipt see Evidence D a.

MALICIOUS PROSECUTION.

A Termination of Prosecution.

1. While an action for damages for malicious prosecution depends upon the final determination of the criminal action upon which civil action is based, the particular manner of the termination of the criminal action is not controlling so that the defendant therein is fully discharged; and when the justice of the peace continues it upon a request of the prosecuting witness, and more than thirty days has passed without a trial, in which the prosecutor has remained inactive, the criminal proceeding is terminated under rule 15, C. S., 1500, restricting a continuance of a case by a justice of the peace to thirty days. *Winkler v. Blowing Rock Lines,* 673.

MANDAMUS.

A Nature and Grounds in General.

1. An order of court requiring the board of county road commissioners to carry out the provisions of its resolution to relocate a public road in order to avoid damages to the plaintiff's property is in the nature of a mandamus. *Gaddis v. Road Commission,* 107.

B Subjects of Relief.

a Public Officers

1. Where the board of county road commissioners has passed a resolution ordering a relocation of a public road in order to avoid damaging plaintiff's property, to which he consents the subject-matter is one within the discretion of the board under the provisions of our statute, and therefore is not enforceable as a contract between the parties. *Gaddis v. Road Commission,* 107.

b Directors of Private Corporations

1. Mandamus will lie to compel directors of private corporations to declare dividends. *Cannon v. Mills' Co.,* 119.

MANSLAUGHTER see Homicide A.

MASTER AND SERVANT.

A Master's Liability for Injuries to Servant.

a Warning and Instructing Servant

1. When an employee at work at a power-driven machine, simple in its operation, and under circumstances in which he was in a position to

MASTER AND SERVANT—*Continued.*

fully know his danger, does a negligent act easily avoidable by him that causes the injury in suit, he may not recover of his employer for the injury received by him in consequence of his own act, though the vice-principal of his employer had formerly instructed him of a very obvious remedy to be applied under the circumstances of the particular case, and which would not have caused the injury, except for the employee's negligent act. *Jackson v. Mfg. Co.*, 18.

b Scope and Extent of Liability of Contractor and Subcontractor

1. When a contractor and subcontractor are engaged in the erection of a building, and the evidence tends to show that an employee of the former was injured by a falling beam while engaged in the performance of his duties, the falling of which was caused by the negligence of the servants of the latter, under conditions that were unsafe and known to each master, who negligently permitted the dangerous conditions to continue, the issue as to whether the principal contractor was secondarily liable does not arise. *Taylor v. Construction Co.*, 30.

c Assumption of Risk

1. Where an employee acts, under fear of discharge, upon the negligent order of the employer's vice-principal, which results in the personal injury in suit, under circumstances showing that a man of ordinary prudence would have so acted, the doctrine of assumption of risk has no application. *Ogle v. R. R.*, 795.

d Methods of Work

1. Evidence tending to show that the plaintiff, an employee of defendant, was injured by a heavy curbing slipping from the top of a pile of paving blocks, is insufficient to take the case of actionable negligence to the jury and resist defendant's motion as of nonsuit. *Harris v. Lassiter*, 866.

e Safe Place to Work

1. *Held*, under the facts of this case involving the liability of the defendant in negligently furnishing its minor, an inexperienced employee, an unsafe power-driven machine to do his work, no error in the judgment for damages in the plaintiff's favor. *Dalton v. Cabinet Co.*, 870.

B Master's Liability for Injuries to Third Parties.

a Injuries Within Scope of Employment

1. One employed by the owner of a dairy for the delivery of milk to customers by means of a wagon drawn by a horse, and collecting the empty bottles from the customers, is merely a hired man or a laborer for the performance of a simple and definite task, and when he is informed of an enforced rule of the owner that no one should be permitted by him to ride on the delivery wagon, and in violation thereof he permits a nine-year-old boy to ride thereon and help him in the performance of his duty, without the knowledge of the owner, and without the necessity, and a personal injury is inflicted on the boy by reason thereof, and through negligence:

MASTER AND SERVANT—*Continued.*

Held, it was without the scope of the employment of the driver to allow the boy to ride, and the owner is not responsible for the damages. *Hayes v. Creamery*, 113.

2. The employer may not escape liability for the personal injury of a nine-year-old boy caused by an employed driver of a milk wagon in permitting the boy to ride on the wagon in violation of his rules, previously made known to the driver, when it may reasonably be inferred that the rule had been abrogated by his knowledge of its habitual violation by his drivers. *Ibid.*

3. *Held*, whether an employer had waived his rule that his employees not permit children to ride on a milk delivery wagon, by knowing that an employee habitually broke the rule is, upon proper evidence, a question for the determination of the jury. *Ibid.*

4. An instruction is erroneous which deprives the defendant, in a personal injury case, of the benefit of its rule prohibiting the driver of its milk wagon from allowing children to ride thereon, arising under the evidence of the case, upon the question of whether the driver was acting within the scope of his employment when the plaintiff was injured by the driver's alleged negligent act. *Ibid.*

5. Where the plaintiff seeks damages in his action against the defendant for the negligence of the latter's delivery truck driver in colliding with the plaintiff's automobile on the highway, the evidence, as to the identity of the defendant's driver and that he was acting within the scope of his employment at the time of the injury complained of, is sufficient to take the case to the jury and deny defendant's motion for a nonsuit under the facts of this case. *Misenheimer v. Hayman*, 613.

MERITORIOUS DEFENSE see Judgments E a.

MISJOINDER OF PARTIES AND CAUSES OF ACTION see Pleadings A a 1.

MORTGAGES (Priority Between Judgment and Mortgage see Judgments H a).

A Rights and Liabilities of Parties.

a Of Purchaser under Foreclosure

1. The last and highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under the provisions of C. S., 2591, acquiring no right until the statutory provision of ten days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. *Cherry v. Gilliam*, 233.

2. When an injunction has been issued against a foreclosure sale under the power contained in a mortgage of lands, but notice thereof not received until after the last and highest bid has been made, but before the consummation of the sale by payment and delivery of the deed, the sale is void, and the purchaser therein acquires no right thereunder. *Wilson v. Bryan*, 360.

3. Where a foreclosure sale of lands under a power of sale contained in a mortgage has been made and the mortgagee has not been

MORTGAGES—*Continued.*

notified before the bidding that an injunction had been issued by the court restraining the sale: *Held,* the sale is void from the time of the issuance of the restraining order, though the mortgagee would not be guilty of contempt in disobeying it until after notice of its issuance. *Ibid.*

4. The last and highest bidder at a sale of lands under foreclosure of a mortgage is not an innocent purchaser for value when the court has previously issued an injunction against the sale. *Ibid.*

b Of Mortgagor and Mortgagee

1. Within the statutory limit of ten days from the time of a foreclosure on lands under the powers contained in a mortgage, the payment of the full mortgage debt to the mortgagee cannot be a wrong, or a fraud in damages on the last and highest bidder at the sale, and no recovery of damages can be had by him against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed. *Cherry v. Gilliam,* 233.

2. Where a second mortgage mortgagee has been damaged by the act of the mortgagor in removing a dwelling from the mortgaged premises, and the lands have been foreclosed by the first mortgagee, the measure of his damages, in his action to recover them, is the value of the building so removed within the amount due and unpaid upon his note secured by his recorded mortgage. *Edwards v. Meadows,* 255.

B Converting Deed into Mortgage—(Limitation of Action Therefor see Limitations of Actions A b).

a Grounds Therefor

1. Equity will not convert a deed, conveying upon its face an absolute fee-simple title to lands, into a mortgage when it is not shown that the clause of redemption was omitted by reason of fraud, mistake, or undue influence. *Waddell v. Aycock,* 268.

C Foreclosure by Action.

a Limitation on Mortgage Securing Notes in Series

1. Where notes are given in series, secured by a mortgage on lands providing that upon the nonpayment at maturity of each as they became due all of them were to become due and payable, it is at the option of the mortgagee to enforce the sale upon the happening of the event so specified, and when the mortgagee has not exercised his option, the statute of limitations would apply as from the due date of each note in the series, as if the provision for the acceleration of the payment had not been incorporated in the mortgage. *Meadows Co. v. Bryan,* 398.

2. Where the owner of two separate tracts of land has given a mortgage on both, on one to secure notes in series, and against some of the notes the statute of limitations against foreclosure has run, the holder of the first lien is only entitled out of the proceeds of sale of the other tract to receive payment as far as the same may extend on the notes that have not been barred, as against the holder of a second mortgage lien on the second tract of land. *Ibid.*

MORTGAGES—*Continued.*

b Injunction Against Foreclosure

1. The foreclosure of a deed of trust given to secure a payment due to the contractor for the erection of a building will not be restrained at the suit of the owner on the ground that an action of a materialman was then pending in court to enforce his lien, which action involved the amount he was then due under his contract, when the notes secured by the deed of trust are due and payable, and the trustee is not shown to be insolvent, and there is no allegation of fraud, oppression, or any element that would make the foreclosure inequitable. *Lumber Co. v. Conrades*, 626.

MOTIONS—to Dismiss see Pleadings A b 1—of Nonsuit see Trial B—for New Parties in Supreme Court see Appeal and Error E a—Necessity to Preserve Grounds of Appeal see Appeal and Error A d, in Criminal Cases see Criminal Law F b—to Amend Pleadings see Pleadings D a—for Reference see Reference A a—to Rehear see Appeal and Error A e 2.

MUNICIPAL CORPORATIONS (Eminent Domain see Eminent Domain—Municipal Bonds see Taxation B—Bonds for Municipal Construction see Principal and Surety A b).

A Public Improvements.

a Contracts Therefor

1. Where, by provision of statute it is required that a contract to be binding upon a city, be signed in its behalf by its manager and by a member of its council, and that the contract be duly authorized by ordinance at a regular meeting: *Held*, a contract coming within these provisions, but signed only by its manager, without the signature of a member of the council, under authority of an ordinance so authorizing him to sign, is not void for nonconformance with the statute. *White Co. v. City of Hickory*, 42.

2. Where a city has accepted the proposition of an engineer to prepare plans and specifications for, and supervise the construction of an enlargement of its water supply to meet its demands thereon, upon a commission basis that will require payment for supervision at stated intervals during the progress of the work, the completion of which will extend the period beyond one year, the contract is to be regarded as a continuing one by interpretation of the law and provisions of the statute applicable in this case. *Ibid.*

3. Where there is express provision of a statute requiring a city in case of making a contract for its fiscal year to make an appropriation for its expenditures thereunder, and as to other contracts, the funds be available when they are executed: *Held*, that when such contract is made to extend beyond the fiscal year, and is a continuing contract, the statute, by its expressed terms, does not apply, and the contract is valid without an appropriation first made. *Ibid.*

b Assessments Therefor

1. An assessment levied for street improvements on abutting property owner, C. S., 2707, is not void on the ground that the assessment was for improving only one side of a street. *Waxhaw v. R. R.*, 550.

MUNICIPAL CORPORATIONS—*Continued.*

2. An assessment made on abutting landowners for street improvements by a city under its charter prohibiting a second assessment within ten years, applies to the entire lot when a corner one abutting on two streets improved, and when one street has been improved, an assessment within the limited ten years on the lot fronting on the other street is prohibited by the charter. *Flowers v. Charlotte*, 599.

3. Where a special act prohibits a second assessment for street improvements on the same land within ten years, an assessment made under a general statute, which is merely cumulative and does not repeal special acts, is void when made in conflict with the provisions of the special act. *Ibid.*

B Ordinances (of State Highway Commission see Homicide B b 3).

a Validity

1. A city ordinance passed in pursuance of C. S., 2787(11), requiring a license to be issued by the municipal authorities to beg upon the city streets or to solicit contributions for charitable or religious purposes, in accordance with whether the person or purpose is ascertained by such authorities as worthy or whether the moneys solicited will be properly applied, is a valid and undiscriminating exercise of a police power, and not unlawful as an interference with the religious liberties of our people, or an obstruction to the lawful pursuit of their business. *S. v. Hundley*, 377.

b Criminal Prosecution for Violation (Violation as Constituting Criminal Negligence see Homicide A b 1, 2).

1. Where the defendant is charged with violating a city ordinance it must be shown for conviction that the ordinance had been duly passed or enacted by the governing body of the town, and was in existence at the time in question. *S. v. Gill*, 425.

2. On appeal from the mayor's court convicting the defendant of violating an ordinance of the town, the certificate of the mayor of the existence of the ordinance at the time makes out a prima facie case of its existence under the provisions of our statute, C. S., 1750. *Ibid.*

3. When the defendant, convicted of the violation of a city ordinance, on appeal introduces in evidence the minutes of the meeting of the governing authorities of the town, which does not show its passage on a certain date, it is not conclusive that the ordinance had not been passed, at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction, and the question is determined by the verdict of the jury. *Ibid.*

NEGLIGENCE—(in Action by Servant see Master and Servant—Criminal Negligence see Homicide B—of Insurer's Agent see Insurance B a 1—of Officers of Building and Loan Associations see Building and Loan Associations A—of Railroad see Railroad A—on Highway see Highways B—Release from Liability for Negligent Injury see Release A—of Power Companies see Electricity.)

NEGLIGENCE—*Continued.*

A Proximate Cause.

a Negligence, to be Actionable, Must Be Proximate Cause

1. Evidence of a city ordinance as to the manner of driving a milk wagon upon the street is erroneously admitted upon the trial when its application to the facts of the controversy has not been shown. *Hayes v. Creamery*, 113.

2. Negligence is not actionable unless it causes, or contributes in causing the injury in suit, and where the evidence discloses that it was independently and entirely caused by an act of a third person, a judgment as of nonsuit should be entered thereon. *Thompson v. R. R.*, 663.

b There May be More Than One Proximate Cause of Injury

1. Where two or more defendants are sued for damages, upon evidence tending to show the concurring negligence of each as the cause of the injury in suit, there may be more than one efficient proximate cause of the injury. *Ramsey v. Power Co.*, 788.

B Act or Omissions Constituting Negligence.

a In General

1. An action to recover damages for a negligent injury will be dismissed when the evidence discloses that it resulted from an accident from an unknown cause or a known cause which could not have been reasonably anticipated. *Caves v. Mills Co.*, 404.

b Condition and Use of Land

1. One who is injured at night, while attempting to carry a patient into a hospital, by tripping over an unseen wire strung around a grass plot to prevent trespassing thereon cannot recover damages therefor against the hospital, the injury being due to an accident. *Ammons v. Hospital*, 548.

c Particular Injury Need Not Be Foreseen to Constitute Negligence

1. It is not necessary that the particular injury should have been foreseen to recover damages for a negligent killing of plaintiff's intestate. *Collins v. Lumber Co.*, 849.

C Actions.

a Measure of Damages for Negligent Injury

1. An instruction upon the evidence is not erroneous that damages to be awarded for a permanent injury negligently inflicted are the present worth of such amount as is a fair compensation for all physical injury, past, present, and prospective and for diminished earning capacity which are direct and necessary consequences of the defendant's negligence, and also a fair compensation for the physical suffering. *Butler v. Fertilizer Works*, 409.

2. When the trial judge has correctly charged as to the amount of damages recoverable in a personal injury negligence case, it will not be held for error that he had failed to exclude in the defendant's behalf such sums that it had already paid, when the plaintiff had

NEGLIGENCE—*Continued.*

admitted receiving them, and it appears from trial and verdict that the jury had accordingly reduced the amount of their verdict. *Ibid.*

3. The measure of damages to be awarded in a negligent personal injury case is exclusively for the jury, and evidence of the amount of an attempted compromise is properly excluded. *Ramsey v. Power Co.*, 788.

b Pleadings

1. Where a mere passenger in an automobile is injured at a railroad crossing, and brings action both against the driver of the automobile and the railroad company, and alleges in effect that the negligence of the driver of the automobile occurred after he had full knowledge of the negligence of the railroad company's employees, and that this negligence on the part of the driver independently caused the injury in suit: *Held*, a demurrer by the railroad is properly sustained, leaving the liability of the driver of the automobile to be determined. *Ballinger v. Thomas*, 517.

c Within the Discretion of Court to Order X-ray to Determine Extent of Injuries

1. The trial court has the inherent power to order the plaintiff, in a personal injury negligence case, to submit to having an X-ray taken of the alleged injured part to ascertain the extent of the damage complained of, as a matter to be exercised within his sound legal discretion, with due regard to the rights of both parties to the action, and in the absence of abuse thereof, his action is not reviewable on appeal. *Flythe v. Coach Co.*, 777.

D Contributory Negligence.

a Child of Eight Years May be Guilty of Contributory Negligence

1. In an action against a railroad for the negligent killing of plaintiff's intestate, an instruction that a lad nearly eight years of age is incapable of being guilty of contributory negligence is reversible error, contributory negligence, in this case, being a question for the jury under the evidence as to the infant's ability to appreciate the danger and act accordingly for his own safety under the circumstances. *Brown v. R. R.*, 699.

NEGOTIABLE INSTRUMENTS see Bills and Notes.

NEW TRIAL see Appeal and Error D—for Conflicting Instructions see Trial A d 1.

NON OBSTANTE VEREDICTO, JUDGMENT OF see Judgments D.

NONSUIT see Trial B—in Railroad Negligence Cases see Railroad A b 1—in Actions for Manslaughter see Homicide B d—Intoxicating Liquor C a.

NUISANCE see Eminent Domain B a 1, Torts A a 2.

OBLIGATIONS OF CONTRACT see Contracts—Impairment of see Constitutional Law B.

OFFICER—Right to Use Force to Prevent Escape see Escape.

OFFICERS—of Building and Loan Associations see Building and Loan Associations—of Banks see Banks and Banking—Public see Mandamus B a.

ORDERS—Appeal from Interlocutory Orders see Appeal and Error E b.

ORDINANCES see Municipal Corporations B—of State Highway Commission see Homicide B b.

PARENT AND CHILD.

A Duties and Liabilities of Parent (see Husband and Wife A a).

a Issue of Paternity in Action for Nonsupport

1. Where the husband in an action for nonsupport of a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. C. S., 4477; Public Laws 1925, ch. 290. *S. v. Ray*, 628.

PAROL EVIDENCE see Evidence C—in Usury Cases see Usury A a.

PAROL TRUST see Trusts A a 1.

PARTIES—Joinder of Tort-feasors see Torts A a 2—Misjoinder of see Pleadings A a 1—in Action Against Bus Line see Bus Lines A a—in Action for Partition see Partition A e.

PARTITION.

A Actions for Partition.

a Rights of Purchaser Under Order for Partition

1. While the heirs at law of a deceased person may not be estopped under certain circumstances by a former proceeding from again filing a caveat to a will, the purchaser at the partition sale of the lands devised, made under order of the court, and obtaining a deed, is a purchaser for value without notice, and the deed made to him gives him title to the lands. *Mills v. Mills*, 595.

b Conclusiveness of Judgment for Partition

1. While a proceeding to partition land among tenants in common cannot confer title, but is only a division among the tenants of the land held in common under the title they had, the judgment therein is conclusive among the parties and privies, and conclusive of their interest in the lands partitioned. *Wallace v. Phillips*, 665.

2. Where a bankrupt is allotted an undivided interest in certain lands as his homestead and the remainder in the undivided interest in such lands is sold to make assets, and at the sale it is bought by the wife of the bankrupt, and the land is partitioned by order of court, and in the partition proceeding the husband acknowledges the interest in remainder of his wife: *Held*, the judgment in the partition proceeding estops the husband from denying the interest of his wife, and operates as a gift to her. *Ibid.*

c When Order of Sale for Partition May be Made

1. In proceedings for partition of lands among tenants in common, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of

PARTITION—*Continued.*

fact to be determined by the trial judge, and not an issue of fact for the jury, and the trial judge has the power to order a sale for partition. C. S., 3215, 3233. *Barber v. Barber*, 711.

d Right to Partition and Defenses Thereto

1. The right of a tenant in common to have the lands sold for a division, C. S., 3215, cannot be defeated by a trust creating an interest in the lands by another of the tenants. *Barber v. Barber*, 711.

e Parties

1. Under a trust created in the lands held in common by one of the tenants therein, the trustee and the beneficiaries are proper parties to the proceedings for a sale for division, so that they may preserve their rights in the proceeds of the sale to be apportioned to the tenant under whom they are thus acquired. *Barber v. Barber*, 711.

2. The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, with the right to be heard when the lands are sold for division in order to protect her contingent interests in the proceeds of the sale. *Ibid.*

PARTNERSHIP.

A Actions Between Partners.

a When Will Lie

1. While ordinarily one partner cannot recover of another on account of a partnership, except after final settlement and accounting, there are exceptions when one partner has destroyed the *corpus* of the partnership or converted it to his own use to the damage of the other. *Enloe v. Ragle*, 38.

PATENT AND LATENT AMBIGUITIES see Evidence C a 1.

PAYMENT—Application of see Account, Action on A a.

PERSONS—Representation of Persons not *in esse* see Trusts C a 1.

PHYSICIANS AND SURGEONS—Confidential Communications see Criminal Law A d.

PLEADINGS—(in Criminal Cases see Criminal Law and Specific Titles of Crime—of Fraud see Fraud A—of Negligence see Negligence C b—in Actions to Set Aside Deed see Fraudulent Conveyances).

A Demurrer.

a Nature and Grounds

1. An action is not subject to demurrer for misjoinder of parties and causes of action when founded upon a note secured by a mortgage and brought against the original payees, endorsers, some with and some without recourse, and in some instances of transfer fraud is alleged, its entire history arising from the same transaction and those connected with liability in various capacities for its payment. *Cotton Mills v. Maslin*, 12.

PLEADINGS—*Continued.*

2. A demurrer to pleadings may be taken to the whole complaint or to any of its allegations of causes of action, but will not be sustained if the pleadings, liberally construed are sufficient to sustain the causes therein, to which such objection is made. C. S., 512. *Enloe v. Ragle*, 38.

3. To sustain a demurrer to the complaint for misjoinder of parties and causes of action the defectiveness complained of must appear upon the face of the complaint to which the objections are made. *Reel v. Boyd*, 273.

4. A demurrer to the complaint will be sustained when, admitting for the purposes of the demurrer the truth of each material allegation of fact, and relevant inferences thereof reasonably deducible therefrom, a cause of action has not been sufficiently alleged. *Ballinger v. Thomas*, 517.

5. Where the plaintiff has not asked to be permitted to file an amendment to his complaint upon a demurrer being interposed thereto on the ground that a cause of action had not been sufficiently alleged, 3 C. S., 513, it will be considered on appeal that he has concluded to rely solely on the pleading he has filed. *Ibid.*

6. To sustain a demurrer to the complaint there must be a misjoinder of parties and causes of action, and a misjoinder of an unnecessary party is alone insufficient to have the action dismissed. *Furniture Co. v. R. R.*, 636.

7. Upon an appeal from a judgment overruling a demurrer to the complaint the merits of the controversy are not presented, and the court will determine only whether a cause of action has been sufficiently alleged. *Ibid.*

8. An action by the receiver of an insolvent bank against its directors and officers, to recover for depositors and creditors moneys fraudulently diverted to their own use by the defendants in various amounts, is not demurrable for misjoinder of parties and causes of action, when, in effect, the allegations are of a conspiracy, participated in by all to accomplish the particular result complained of as the basis of the action, narrating one general scheme tending to a single end. *Trust Co. v. Peirce*, 717.

9. Where the complaint against a corporation and others alleges the foreclosure of a mortgage securing a loan by a corporation, bid in at the amount of the loan at a greatly inadequate price, that the corporation continued the loan for its agents in the original amount and the agents sold this equity at a handsome profit, and it generally appears from the plaintiff's allegations that this was done in pursuance of a fixed design of the agents to defraud the plaintiff, with implied notice to the corporation, or that it had sufficient notice to have put it on reasonable inquiry which would have revealed the fraud, and all parties thereto participated in the fraud and received benefits therefrom: *Held*, a demurrer *ore tenus*, made after answers filed, for misjoinder of parties and causes of action is bad. *Scales v. Trust Co.*, 772.

PLEADINGS—*Continued.*

10. *Held,* in this case a cause of actionable fraud was alleged connecting all the parties with the grounds thereof, and is not demurrable for misjoinder of parties and causes of action. *Cotten v. Laurel Park Estates,* 848.

b When Can Be Made

1. A demurrer that the allegations of the complaint are insufficient to constitute a cause of action is equivalent to a motion to dismiss the action, and may be made at any time, even in the Supreme Court, or the Court may, *ex mero motu* take cognizance of the fact, and dismiss the action. *Enloe v. Ragle,* 38.

c Speaking Demurrer

1. A demurrer that depends exclusively upon its own material allegations to establish a vital defect in the pleadings objected to is bad as a "speaking demurrer." *Reel, Admx., v. Boyd,* 273; *Scales v. Trust Co.,* 772.

d Effect of Demurrer

1. A demurrer to the complaint admits every material fact properly alleged, and all inferences and intendments as may be fairly and reasonably drawn therefrom by liberal construction, so that actions may be tried on their merits in furtherance of our Code system. *Van Kempen v. Latham,* 389.

B Counterclaim.

a When Can Be Pleaded—Actions on Contract, in Tort.

1. Where the plaintiffs' action is to establish their title to and recover possession of mineral interest in a described tract of land, and defendants set up as a counterclaim damages alleged to have been caused by the plaintiffs' slander of their title: *Held,* the cross-action alleged is for damages founded upon a tort, and not on contract, and does not fall within the equitable principle of a suit to quiet title, under the provisions of C. S., 519, 521, 522, and a demurrer thereto is good. *Thompson v. Buchanan,* 155.

C Extension of Time for Filing Pleadings.

a Power of Trial Court to Extend Time

1. The authority of the Superior Court judge to set aside an order of the clerk upon the pleadings and grant extension of time to plead, etc., is not impaired by the statutory jurisdiction given the clerk. *Mfg. Co. v. Kornegay,* 373.

2. Where the clerk of the court has extended the time for filing the complaint in accordance with 3 C. S., 505, and the defendant has appealed to the Superior Court, it is within the sound legal discretion of the trial judge, given by C. S., 536, to allow the complaint to be filed, and his sustaining the clerk's order to that effect is an exercise of this discretion. *Hines v. Lucas,* 376.

b Power of Clerk of Court to Extend Time

1. When it appears that the clerk of the court has extended the time to file the complaint by orders regularly entered and in continuous and unbroken sequence for a period of about a year, and the de-

PLEADINGS—*Continued.*

fendant at the end of the full period so extended excepts and appeals to the Superior Court: *Held,* it is a valid exercise by the clerk of the power conferred by C. S., 505. *Hines v. Lucas,* 376.

D Complaint.

a Amendment to Complaint Not Constituting New Action

1. Where one administratrix has renounced her right, and a second has been appointed, and the second administratrix has brought action and made her mark to the complaint, the action of the trial judge in correcting a mistake in the summons and complaint by changing the name of the first administratrix to that of the second, does not change the cause of action, and does not constitute error. C. S., 547. *Hill v. R. R.,* 605.

2. An amendment to a complaint in an action to set aside a conveyance of land for fraud is not substantially changed by an amendment allowed the plaintiff in the discretion of the trial court, to allege damages sustained and provable as directly resulting therefrom. C. S., 547. *Parker v. Realty Co.,* 644.

b Notice of Motion to Amend

1. Notice of a motion to amend the complaint in a pending cause at term is not required to be given the defendant, and the absence of the defendant's attorneys from court at the time is not a good ground for exception to the allowance of the motion by the judge presiding. *Parker v. Realty Co.,* 644.

PONDING WATERS see Eminent Domain B a 1.

POWERS OF STATE HIGHWAY COMMISSION see Highways A a.

PRESUMPTIONS—of Title Out of State see Ejectment A—from Evidence see Evidence D—on Review see Appeal and Error A b.

PRIMARY AND SECONDARY LIABILITY—in Handling Ward's Estate see Guardian and Ward A b—of Master see Master and Servant A b 1—of *Tort-feasors* see Torts A—Priority see Mortgages H a.

PRINCIPAL AND AGENT (Insurance Agent see Insurance).

A Rights and Liabilities as to Third Parties.

a Ratification.

1. The principal may not accept the full or a partial benefit of his agent's unauthorized act, with knowledge, and avoid liability upon his failure to perform the duties fixed upon him by the terms of the contract thus made in his behalf. *Parks v. Trust Co.,* 453.

B Rights and Liabilities of Agent.

a Right to Compensation for Services Rendered (Interest Thereon see Interest A a).

1. Where, at the request of the owner, a real estate agent begins negotiations for the lease of his building, which is finally successfully concluded by the concurring efforts of them both, the agent is entitled to a reasonable compensation for the value of the services he has rendered. *Thomas v. Realty Company,* 591.

PRINCIPAL AND AGENT—*Continued.*

b Evidence of Reasonable Value of Services

1. In relation to the question of the value of the services rendered, under the facts of this case, it is *Held*, competent, in the absence of a special contract fixing the amount, to show in evidence a schedule of commissions of the board of real estate men in that locality, with evidence of its reasonableness, when the jury's consideration thereof is properly confined to the question of reasonable value. *Trust Co. v. Goode*, 164 N. C., 20, cited and distinguished. *Thomas v. Realty Co.*, 591.

PRINCIPAL AND SURETY.

A Nature and Extent of Liability of Surety—(on Bond of Clerk of Court see Clerks of Court B—on Replevy Bond see Attachment B).

a On Bonds Given by Bank Securing Depositor

1. The liability of sureties on a bond given by a bank as principal, to indemnify a depositor against loss for moneys deposited in the bank at the time of its execution, will not be construed by implication to extend beyond securing the deposit therein stated, and bonds of this character are to be strictly construed as to their expressed terms. *Ingram v. Bank*, 357.

b On Bonds for Municipal Construction

1. Under the statutory amendment of chapter 100, Public Laws 1923, secs. 1 and 2, to C. S., 593, 595, 596, 597, the sureties on a contractor's bond for the erection of a municipal building are liable for the payment of those who furnish material used in the construction, and those doing labor therein, irrespective of the terms of the contract of indemnity, C. S., 2445, except the surety is not liable for an amount in excess of the penalty of the bond, and a judgment against the surety for an amount in excess of the penalty of the bond given is erroneous, and the surety may relieve himself from liability by paying the amount for which he is legally liable into the court for distribution. *Supply Co. v. Plumbing Co.*, 629.

c On Bonds with Bus Lines

1. Where the surety on a bond indemnifying a public auto-bus service against liability for negligent injury, and the bond which is filed with the Corporation Commission under the rules provided by statute, limits the surety's liability to buses run on regular schedules between termini of the line, no recovery can be had against the surety by a person injured by the negligent driving of the bus on a special trip not covered by the terms of the policy of indemnity sued on. *Flythe v. Coach Co.*, 777.

d On Bonds for Construction of Highways

1. In determining the question of the liability of the surety on the bond of a contractor with the State Highway Commission for default of the contractor in building a State highway in accordance with his contract, the contract will be interpreted in the light favorable to the surety when a doubt as to its meaning reasonably arises from the language used. *Highway Commission v. Rand*, 799.

PRINCIPAL AND SURETY—*Continued.*

2. The surety bond given to the State Highway Commission by a contractor for the construction of a highway under the provisions of our statute, Public Laws of 1925, ch. 200, contemplates the protection of laborers and materialmen who have no statutory lien. Const. of North Carolina, Art. X, sec. 4; Art. XIV, sec. 4. *Lumber Co. v. Lawson,* 840.

3. In determining the liability of the surety on a contractor's bond for the building of a State highway, the contract and the bond of indemnity will be construed together strictly in favor of the surety. *Ibid.*

4. The surety on a bond given by the contractor for the building of a State highway is not liable for damages caused to the lands of owners upon the route thereof by fires negligently set out by the contractor, or his employees, unless such liability has been clearly assumed under the contract and the bond of indemnity given therefor. *Ibid.*

5. A clause in an indemnity bond against liability in the construction of a State highway, and protecting the laborers and material furnishers therein, to the effect that the contractor "also shall save and keep harmless the State Highway Commission all loss from any cause whatsoever," is for the protection of the Highway Commission, and does not include in the surety's liability a negligent loss by fire to an owner of lands along the route of the highway while being constructed. *Ibid.*

6. Our statute of 1925 (ch. 260, sec. 3) providing a method for the enforcement of a lien of laborers and materialmen, etc., providing action may not be brought by any laborer, materialman or other person until after the completion of the highway contracted for, the term "or other person" applies to others of the class just enumerated, and the principle of *ejusdem generis* applies, and excludes torts committed by the contractor or its employees in negligently setting fire to lands along the route of the project, the subject of the contract. *Ibid.*

PROBATE see Wills F.

PROCESS see Summons.

PROXIMATE CAUSE see Negligence A.

PUBLIC HIGHWAYS see Highways.

PUBLIC IMPROVEMENTS see Municipal Corporation A.

PUBLIC SCHOOLS see Schools and School Districts.

QUASI-CONTRACTS—for Services Rendered see Principal and Agent B.

QUESTIONS FOR JURY—in Action by Servant for Injuries see Master and Servant A d—in Insured's Action Under Disability Clause see Insurance C b—in Railroad Negligence Cases see Railroad A a 2, 3—in Locating Boundaries in Deed see Deeds and Conveyances C—see Trial B d.

RAILROADS (as Carriers see Carriers).

A Operation.

a Injuries to Persons on Track

1. When a pedestrian attempts to cross a railroad track on the street of a town without looking, under ordinary circumstances, to ascertain whether a train is approaching, when the view is unobstructed and there is nothing to prevent his thus apprehending the danger in time to avoid injury, or any circumstances from which he may reasonably infer this precaution unnecessary, his own negligence in so acting is the proximate cause of his injury and is a bar to his recovery, though the defendant was negligent in not giving proper warnings of approach; and, upon the uncontradicted evidence, plaintiff's motion as of nonsuit should be allowed. *Pope v. R. R.*, 67.

2. In an action to recover damages from a railroad company for the negligent killing of plaintiff's testate at a grade crossing of the railroad with a much used street of a city, when there was evidence tending to show that defendant's long freight train had blocked the street and had been broken to clear the street for traffic, and that the testate, probably regarding this as an invitation, immediately went upon the tracks, when his view was obstructed by the cars of the freight train on either side, without looking or listening, and was struck by defendant's passenger train on a parallel track, coming without signal or warning; with further evidence that other employees of the defendant on the freight train could have perceived his danger and have warned him in time: *Held*, the question of negligence and contributory negligence was for the jury under instructions as to whether the defendant's negligence was the proximate cause of the injury, or the testate's negligence proximately contributed thereto, under the rule of the prudent man. *Finch v. R. R.*, 190.

3. Where there is evidence tending to show that the plaintiff's testate failed to look and listen for trains before attempting to drive across the tracks of defendant railroad company, at a much used grade crossing with a city street, and was struck by defendant's train, under circumstances tending to show defendant's negligence, and its invitation for the testate to cross that would have excused his own negligence, the question is one for the jury under proper instructions from the court. *Ibid.*

4. In an action against a railroad company to recover damages for the negligent killing of plaintiff's testate, while he was attempting to drive across its tracks in an automobile at a grade crossing with a frequented street of a city, there was evidence tending to show that the testate failed to look and listen for an approaching train that caused the accident resulting in death, with allegation in the complaint of specific facts that would excuse his not having done so: *Held*, the admission of vague evidence, and instruction thereon of a specific and additional fact not alleged in the complaint, bearing upon the issue of contributory negligence in the plaintiff's favor, is a variance between allegations and proof that constitutes reversible error. *Ibid.*

5. Where there is evidence tending to show that at a highway grade crossing with a railroad the railroad had piled its crossties so high

RAILROADS—*Continued.*

as to obstruct the view of its train, which came without signals or warnings, and struck an automobile and killed its occupants, it is sufficient evidence of the actionable negligence of the railroad company to take the case to the jury in the administratrix's action to recover damages for the killing of her intestate. *Hill v. R. R.*, 605.

7. Where the evidence tends only to show that the plaintiff's intestate was killed while attempting to cross in an auto-truck the defendant's railroad at a grade crossing, in full possession of his faculties, both actual and apparent, without looking or listening or observing the procedure ordinarily required under the circumstances, and this failure alone caused his death, by the collision of his truck with the defendant's train, his contributory negligence bars his recovery as a matter of law, and the issue as to the last clear chance is not presented for the jury to determine in regard to fixing the defendant with liability. *Redmon v. R. R.*, 764.

b Accidents to Trains

1. Evidence tending to show that the plaintiff was a passenger on defendant's train, and was injured by the negligence of defendant's crew in leaving the car in which plaintiff was riding on the track without having the brakes on, and that the car started rolling down grade, and that the plaintiff jumped from the car to save herself from imminent peril, is sufficient to sustain a verdict in her favor. *Buckner v. R. R.*, 654.

B Width of Right of Way.

1. Where in an action of trespass, involving the title to mineral interests in land, the question depends upon the location and width of a railroad's right of way, as to whether it extended beyond the present location of its roadbed under a grant or deed, the presumption is that the right of way extends to the width specified in the charter of the railroad, in the absence of any restrictions contained in the deed to the railroad company. *Heaton v. Kilpatrick*, 708.

2. The presumption that the right of way of a railroad company extends to that given in its charter is aided by the provisions in the grant allowing the owners to cultivate the lands, under certain conditions, to that not required for railroad purposes. *Ibid.*

RATIFICATION see Principal and Agent A a.

RECEIVERS (of Building and Loan Associations see Building and Loan Associations A—of Drainage District see Drainage Districts C a 1—of Banks see Banks and Banking A b 1).

A Foreign Receivers.

a Right to Maintain Action in this State

1. A receiver appointed by a foreign nation for the estate of a friendly alien may be permitted by our courts to sue herein under the spirit of comity, when there is nothing involved in the action that may be construed as against our public policy or the rights of our citizens. *Van Kempen v. Latham*, 389.

RECEIVERS—*Continued.*

2. In order for the foreign receiver of the estate of a friendly alien to maintain his action in the courts of our State under the spirit of our comity laws, if traversed, he must establish the fact of his receivership by a duly certified transcript to that effect from the court of his appointment. *Ibid.*

3. The receiver appointed in a foreign jurisdiction has no extra territorial right to maintain an action in the courts of this State. *Ibid.*

B Title to and Possession of Property.

a Title to Property Under Conditional Sale to Insolvent

1. A receiver represents creditors of an insolvent corporation, and while a conditional sale to the corporation does not require registration as between the parties, after the receivership its validity as to the rights of creditors depends upon its registration in conformity with C. S., 3311, 3312. *Acceptance Corporation v. Mayberry*, 508; *Mfg. Co. v. Price*, 603.

b Title to Proceeds from Sale of Property Held Under Conditional Sale by Insolvent

1. Where a corporation purchasing goods under a contract reserving title in the vendor, has sold some of them, and has obtained cashier's checks for the proceeds, payable to the order of the owner of the title, and afterwards becomes insolvent and is put in a receiver's hands, the receiver in possession of the checks acquires no better title than his insolvent corporation, and the proceeds are the property of the owner of the title. *Acceptance Corporation v. Mayberry*, 508.

c Property Bequeathed to Insolvent

1. A bequest of ten thousand dollars in certain bonds to a man and his wife by entireties, when the man is indebted to the estate, which has not yet been settled, may not be anticipated upon the facts found by the trial court, and ordered to be turned over to a receiver, until a final accounting. But the judgment will stand, subject to the final accounting upon requiring the husband to give a five thousand dollar bond of indemnity, sufficient in form and approved by the clerk of the court. *Winchester-Simmons Co. v. Cutler*, 612.

C Management and Disposition of Property.

a Leases

1. Where the lessee corporation, operating a theatre, has become insolvent and is in the hands of a receiver, and its assets consist largely of the value of its lease with the plaintiff, the lessor, who seeks to cancel the lease for the nonpayment of rents due thereunder, and it is made to appear that the receiver has put valuable improvements on the building, and that it is to the best advantage of creditors that the receiver operate under the lease: *Held*, the judgment of the court that the receiver operate the theatre under the lease upon paying all rent in arrears, and promptly paying the rent as it may accrue in the future, is not error, there being no

RECEIVERS—*Continued.*

provision in the lease that the lessor have an option to reënter and declare the contract void. C. S., 2343, 2372. *Coleman v. Carolina Theatres*, 607.

D Payment of Claims.

a Secured Creditor May Resort Primarily to General Fund

1. Where a bank has secured a deed of trust on lands from its customer as a basis for a line of credit, upon the insolvency and receivership of the customer, the bank may primarily resort to its proportionate part of the assets, available to general creditors in the receiver's hands, before proceeding to realize upon its mortgage security. *Bank v. Jarrett*, 798.

RECORD see Appeal and Error A d.

REDEMPTION, Equity of see Mortgages A a 1; A b 1.

REFERENCE.

A Report and Findings.

a Party Moving for Reference May Except to Report (Appeal from Order Allowing Exception see Appeal and Error E b 1).

1. Construing C. S., 578 and C. S., 579, together as being in *pari materia*, it is *Held:* a party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee. *Contracting Co. v. Power Co.*, 649.

REFORMATION OF INSTRUMENTS.

A Degree of Proof Required Therefor.

1. Equity will not reform a deed for the mutual mistake of the parties, or the mistake of one superinduced by the fraud of the other unless the party seeking this relief establishes the same by clear, strong, and convincing proof. *Lloyd v. Speight*, 179.

REGISTRATION—of Conditional Sales see Sales A a, as Affecting Receiver see Receivers B.

REHEAR, Motion to see Appeal and Error A e 2.

RELEASE OF RIGHT OF ACTION FOR TORT OR NEGLIGENT INJURY.

A Requisites and Validity.

a Fraud in Procurement and Evidence of Fraud

1. When the defendant relies upon a release signed by the plaintiff to bar his action to recover damages for an alleged negligent injury, it is competent for the plaintiff to testify on the issue of fraud in the procurement that at the time he executed the release he was confined in the hospital, suffering from the injury and without financial means, and that his condition was known to the defendant's agent who thus procured the release by fraud. *Butler v. Fertilizer Works*, 409.

2. The gross inadequacy of the money paid to obtain a release for damages resulting from an injury is an element to be considered upon the question of fraud in its procurement, and is sufficient to sustain an affirmative answer to the issue. *Ibid.*

REMAINDERS, Contingent see Wills E a 1.

REMAND see Appeal and Error B—Disposition After see Appeal and Error C a.

REMOVAL OF CAUSES.

A Status of Erroneous Judgment for Removal.

1. An order of the clerk of the Superior Court, having jurisdiction of a motion to remove a cause from the State to the Federal Court for diversity of citizenship under the provisions of 3 C. S., 913(b), that the cause be removed as prayed by the defendants, meeting the requirements of the Federal statutes relating thereto, and made in apt time, is not void, and when improperly made is erroneous. *Abbitt v. Gregory*, 203.

B Setting Aside Judgment of Removal.

a For Surprise, Excusable Neglect, etc.

1. Where a cause has been remanded to the State from the Federal Court by the latter court, and the clerk of the former court has had entered, without notice to defendant, a judgment by default and inquiry for the want of an answer, pending the disposition of the cause in the Federal Court, and the order of remand has been regularly made, upon motion of the plaintiff's attorney, the judge of the Superior Court of the State having jurisdiction may set aside the judgment by default and inquiry upon the ground of mistake, inadvertence, surprise, or excusable neglect, upon the showing of a meritorious defense. C. S., 600. *Abbitt v. Gregory*, 203.

C Effect of Removal.

a Right of Parties to Assume that no further proceedings be had in the State Court until Remand

1. Where the clerk of the State Court has erroneously granted defendant's motion to remove a cause from the State to the Federal Court on the ground of diversity of citizenship under the provisions of the Federal Removal Act, the moving defendants may assume that no further proceedings be had in the State Court until the cause has been remanded from the Federal Court, and where a judgment by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys, upon relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendant to file answer will not be disturbed on appeal. *Abbitt v. Gregory*, 203.

D Grounds for Removal.

a Diversity of Citizenship

1. The defendant, to remove a cause from the State to the Federal Court for diversity of citizenship, must allege his nonresidence in this State. *Townsend v. Holderby*, 854.

RENT see Landlord and Tenant C.

REPLEVY BONDS see Attachment.

REPRESENTATION OF PERSONS NOT IN ESSE see Trusts C a 1.

RESIDENCE—(as Affecting Venue see Venue B—as Affecting Right to Vote see Elections B a).

RESTRAINT UPON ALIENATION see Wills E a 7.

RESTRAINT OF TRADE, Contracts in see Contracts A b.

RESTRICTIVE COVENANTS see Deeds and Conveyances B bb.

REVIEW see Appeal and Error A—of Order Setting Aside Judgment for Surprise, Excusable Neglect, etc., see Judgments C b.

ROADS AND HIGHWAYS see Highways.

RULES OF COURT see Appeal and Error A d—in Criminal Cases see Criminal Law F a.

RULE IN SHELLEY'S CASE see Wills E b, Deeds and Conveyances B aa.

SALES.

A Conditional Sales.

a Construction of Contracts as Conditional Sales

1. Where the vendor of personalty ships to itself as consignee, order notify the purchaser, and the latter has received money from another with which to pay the draft and obtain the goods from the common carrier, under an agreement that the title to the goods shall vest in such third person until the goods are paid for, the effect of the contract is a conditional sale, falling within the meaning of C. S., 3311, 3312. *Acceptance Corporation v. Mayberry*, 508.

2. Whether or not a written contract between the purchaser and vendor is a conditional sale is a matter of legal construction of the contract. *Ibid.*

3. A contract under which the seller ships to the purchaser certain goods, to which the latter acquires title upon the payment of the specified purchase price, is a conditional sale, requiring registration as against the rights of creditors. *Trust Co. v. Motor Co.*, 193 N. C., 663, cited and applied. *Mfg. Co. v. Price*, 602.

b Rights of Parties Under Conditional Sales

1. Where the purchasing dealer corporation to be notified in shipment of certain automobiles with draft attached has obtained money from a credit corporation with which to pay the draft and obtain the goods, and has taken the automobiles into its possession under a written agreement for the lender of the money to retain title until the sale of the automobiles, and having sold some of them it has obtained a cashier's check payable to the lender's order, which with the unsold automobiles goes into the hands of its receiver, later appointed: *Held*, while the title to the automobiles is not good as against creditors without registration, the moneys realized from the payment of the cashier's check is that of the lending credit corporation, unaffected by the creditor's claims on the drafts of the insolvent corporation in the receiver's hands. *Acceptance Corporation v. Mayberry*, 508.

SANITARY DISTRICTS.

A Creation.

a Special Act Creating Sanitary District Unconstitutional

1. An act of the Legislature attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assessments or taxing powers for the purpose is void, being in violation of the provisions of Article II, sec. 29, of the Constitution of North Carolina, prohibiting the enactment of local, private, or special acts relating to "health, sanitation," etc. *Sanitary District v. Prudden*, 722.

b General Act Providing for Creation of Sanitary Districts Constitutional

1. Chapter 100, Public Laws 1927, under which sanitary districts may be created upon petition and approving vote of the residents therein, with further approval of the State Board of Health after a hearing both by the local authorities and by the State Board of Health, with power to issue bonds: *Held*, a general law of Statewide application relating to health, and valid. *Sanitary District v. Prudden*, 722.

2. The validity of chapter 100, Public Laws 1927, relating to the formation of sanitary districts is not affected by the provisions that certain industrial enterprises and villages situate therein may be excluded upon application of the owners. *Ibid.*

B Bonds of Sanitary Districts.

1. Bonds issued by a sanitary district formed in accordance with chapter 100, Public Laws 1927, are a valid obligation, and binding upon the property within the district as a general tax and not an assessment of property according to benefits received. *Sanitary District v. Prudden*, 722.

2. Bonds issued by a sanitary district for sewerage and a water supply under the provision of chapter 100, Public Laws 1927, will not be declared invalid because not differentiating between property benefited and not benefited when the voters within the territory unanimously voted for their issuance, and having full notice and opportunity to do so, no one appeared to make objection on that ground. *Ibid.*

3. Sewerage and water bonds issued by a sanitary district under chapter 100, Public Laws 1927, are for a public necessity, and valid. *Ibid.*

SCHOOL BUDGET see Schools and School Districts B a 1, 2, 3.

SCHOOLS, Right to Issue Bonds for see Taxation B a.

SCHOOLS AND SCHOOL DISTRICTS.

A Consolidation of Districts.

1. Where a county has adopted the county-wide plan or organization for its public schools, and its board of education has consolidated, in good faith, two contiguous school districts with regard to the convenience of those attending the schools of each, and with regard to their better school conveniences and instruction, and at a less cost of maintenance in the consolidation, so much will be upheld in our courts. 3 C. S., 5481. *Parker v. Debnam*, 56.

SCHOOLS AND SCHOOL DISTRICTS—*Continued.*

2. Our statutes, 3 C. S., 5428, 5437, vests in the sound discretion of the board of education of a county the right to transfer an existing school in one district to an adjoining district for the advantage of the residents of the county, and with the fair exercise of this discretion, or in the absence of manifest abuse, the courts will not interfere, or give injunctive relief. *Clark v. McQueen,* 714.

B Contracts for Teachers' Salaries.

a Liability of County Commissioners Therefor

1. When the board of trustees of a school district recommends public school teachers for the ensuing term of schools to the county superintendent of education, his contracts with teachers so recommended, made in accordance with the provisions of the statute relating thereto becomes a binding obligation upon the county commissioners when approved by it, and is in conformity with the budget of the county board of education, or when it is later approved by the county board of commissioners under the provisions of the statute. 3 C. S., 5533, 5805, 5572, 5571, 5559, 5561, 5516. *Hampton v. Board of Education,* 213.

2. When there is one month for which the teachers of a school district have not been paid in accordance with their contracts of employment, and from the sum total of the approved budget of the board of education there remains a sufficiency to pay them, the board of county commissioners is liable for its payment, the statute not requiring the approval of the county commissioners for each separate item of the school budget. *Ibid.*

3. Where the county board of education, by paying its teachers for a term of school have done so by nine monthly installments, for the calendar year, instead of by twelve installments, and in consequence the teachers have not been paid for three months of the year, a resolution of the board of county commissioners authorizing the county board of education in effect to pay them out of the allowance made by its budget for the year following is a "budgeting forward" approved by the board of county commissioners, and is binding upon the available funds accordingly, when the other requirements of the statutes on the subject are complied with. The provisions of chapter 277, Public Laws of 1927, have no application under the facts of this case. *Ibid.*

SCOPE OF EMPLOYMENT see Master and Servant B.

SEARCH WARRANT, When Necessary see Intoxicating Liquor D a.

SERVICE—Waiver of by General Appearance see Appearance A—Setting Aside Judgment for Void Service see Judgments F—of Case on Appeal see Appeal and Error F a.

SERVICES RENDERED see Principal and Agent B—Judgment by Default for Services Rendered see Judgments G a 2.

SHELLEY'S CASE see Wills E b, Deeds B aa.

SLANDER see Libel and Slander—of Title When Can be Set Up as Cross-action in Suit to Establish Title see Pleadings B a 1.

STARE DECISIS see Appeal and Error B a 2.

STATE.

A Relationship to Other States.

a Force of Federal Judgments and Judgments of Other States

1. While under our government the states of the United States retain their individual sovereignties, and without special constitutional or valid legislative provisions to the contrary the judgments of each State are to be regarded in the courts of every other State as foreign judgments having no extra-territorial effect, except, that as modified by the Federal Constitution, they shall be given full faith and credit as to their judicial proceedings, etc., and as modified by Congress under the power to prescribe by general laws the manner in which they be proved and the effect thereof. *In re Chase*, 144.

2. By the Federal Constitution with the statutory provisions relating thereto the judgments of the courts in each State are given the same conclusive effect, as records, in all the states as they had at home, and though it does not make them domestic judgments in the other states, to all intents and purposes, it does give them general validity, faith and credit as evidence in the courts. *Ibid.*

3. While not specifically so stated in the Constitution of the United States, Art. IV, sec. 1, judgments of the Federal Courts are to be given the same faith and credit in our State as those rendered in other States, and they are conclusive of all matters involved in the adjudication except when vitiated by fraud, or when the parties to be concluded are not properly before the court. *Van Kempen v. Latham*, 389.

4. A judgment confessed upon a warrant of attorney to that effect, in another state recognizing its validity, will be recognized in the courts of our State under the "full faith and credit" clause of the Federal Constitution, Art. IV, sec. 1, subject to be set aside in a suit thereon brought here, for fraud, or for want of jurisdiction of the court that has rendered it. *Bonnett-Brown Corporation v. Coble*, 491.

5. When an action is brought here on a judgment of a court of foreign jurisdiction recognizing the validity of a warrant of attorney and it appears from an entry of record in the case that the defendant had given the warrant upon which the confessed judgment had been entered, the defendant in the action hereon, the judgment may set up the defense that in fact he had not executed the warrant of attorney, but its legal effect is a matter of law for the court. *Ibid.*

6. In an action by the trustee in bankruptcy of a building and loan association to recover the balance due on loans, the question as to any *ultra vires* act of the association rendering the defendant's obligation void, or as to whether the receiver could maintain his action in the courts of the State, are for the determination of the bankrupt court, and when the proceedings therein are not void upon their face, they will be followed in the State court. *Rendleman v. Stoessel*, 640.

STATE—*Continued.*

B Claims Against the State (Jurisdiction of see Courts A b 1—Under Assurance Fund of Torrens Deeds see Deeds E a).

a State Must Consent to Action

1. Subject to rare exceptions, the State alone has the authority, through its Legislature, to authorize a suit against it, or to allow a claim and provide the method for its payment. *Rotan v. State*, 291.

b Nature in General

1. An action against the State Highway Commission for breach of contract is a claim against the State. *Lacy v. State*, 284.

2. An action to recover moneys paid to the State as an inheritance tax on the order of the State Tax Commission, a political agency of the State, is a suit against the State. *Rotan v. State*, 291.

STATE FAIR see Taxation B b 3, 4.

STATE HIGHWAY COMMISSION see Highways A.

STATUTES—(of Frauds see Deeds and Conveyances A b; Admissibility of Parol Evidence to Explain Writing see Evidence C a 1—of Limitations see Limitation of Actions A—in Relation to Leases see Landlord and Tenant A e—Relating to State Highway Commission see Highways A a 1—Relating to Registration of Deeds and Gifts see Deeds and Conveyances A 1—Relating to Stock-law Elections see Elections A—Relating to License to Sell Stock in Prospective Corporation see Corporations B a—Relating to Drainage Districts see Drainage Districts C b 1—Relating to Right Illegitimate Children to Inherit see Descent and Distribution B a 2—Relating to Assessments for Public Improvements see Municipal Corporation A b 3—Relating to Reference see Reference A a 1).

A Construction.

a Amendments

1. An amendment to a statute by the Legislature may in proper instances be regarded as an interpretation of a former act and considered by the courts as persuasive authority. *Caldwell County v. Doughton*, 62.

b Statutes Relating to Procedure

1. A new statute making a change only in procedure prima facie applies to all actions, whether already accrued at the time of its passage, or then pending or accruing in the future. *Dunn v. Jones*, 354.

c Presumption of Constitutionality

1. Where the validity of a legislative act donating State lands, and the issuance of municipal bonds is in doubt, the doubt will be resolved in favor of the will of the people as expressed by the Legislature and the vote of the citizens to be taxed. *Briggs v. City of Raleigh*, 223.

2. The courts will not declare a statute void as unconstitutional unless the violation of the Constitution is so manifest as to leave no room for a reasonable doubt. *Sanitary District v. Prudden*, 722.

d General Rules of Construction

1. Where it is clear that a relative or qualifying word used in a statute would defeat the legislative purpose by referring it to its last ante-

STATUTES—*Continued.*

cedent, it will be so construed in relation to other words of the statute as to carry out the intent of the Legislature. *Hagood v. Doughton*, 811.

B Repeal and Revival.

1. When a statute, local to a county, as to the holding of an election upon the question of the stock law in any well defined portion thereof, particularly prescribes the method and machinery by which the election shall be held, a general statute requiring the Australian ballot to be used does not repeal the provisions of the local statute unless by express words or necessary implication. *Monteith v. Comrs. of Jackson*, 71.

2. The law does not favor the repeal by implication of one statute by another, but seeks to reconcile them if this can be done by a reasonable interpretation. *Ins. Co. v. Wade*, 424.

3. A statute enacted to obtain revenue for the State government is a public law, and when a section of the Consolidated Statutes provides for a retaliatory tax to be imposed on foreign insurance companies, a later general statute will not be held to repeal it under a general repealing clause, when the section of the Consolidated Statutes is not specially referred to, and the intent of the Legislature to the contrary is shown by statutes amending the section which is claimed to have been repealed. C. S., 6413. *Ibid.*

SUMMONS—Waiver of Service by General Appearance see Appearance A 1—Setting Aside Judgment for Void Service see Judgments F.

SUPREME COURT see Courts A—Rules of Court see Appeal and Error A d, in Criminal Cases see Criminal Law F a.

SURETIES see Principal and Surety—on Replevy Bond see Attachment B—on Clerks' Bond see Clerks of Court B.

SURPRISE, EXCUSABLE NEGLECT, Etc., Setting Aside Judgment for see Judgments C.

SURRENDER BY OPERATION OF LAW see Landlord and Tenant A a.

TAX—Inheritance Tax, Jurisdiction of Federal Courts on Tax Levied by State see Courts B a—Original Jurisdiction of Supreme Court in Action to Recover see Courts A b 2—as to Payment by Check see Bills and Notes A a 1, 2—Retaliatory Tax on Foreign Insurance Companies see Statutes B 3.

TAXPAYERS' SUIT TO ENJOIN TAX SALE, Burden of Proof Therein see Evidence B a.

TAXATION (for Sanitary Districts see Sanitary Districts B).

A Levy and Assessment.

a Review, Correction, or Setting Aside Assessment

1. The right of a dissatisfied taxpayer on lands to have the value of his property reduced for the purposes of taxation in proceedings before the State Board of Assessments by original proceedings, under the statute of 1925, was superseded by the statute of 1927, requiring certain proceedings before the board of county commissioners to

TAXATION—*Continued.*

originally be had, and when the question involved is solely as to whether such value theretofore fixed and agreed upon be reduced, original proceedings before the State Board will be disregarded and considered as a nullity. *Caldwell County v. Doughton*, 62.

B Constitutional Requirements and Restrictions.

a Right of Counties to Issue Bonds Without Approval of Voters

1. When a statute excludes a certain county from issuing bonds for public school purposes, without the approval of the voters thereof, and such statute is amended by a subsequent Legislature so as to allow this county to issue the bonds without the approval of the voters, and a general municipal finance act is passed, generally approving the authority of counties to issue such bonds without the approval of the voters, with the provision that its repealing clause should not affect any local act, but should be in addition thereto: *Held*, the authority of the particular county to issue bonds for the designated purpose, a necessary expense, without submitting the question to its voters for their approval, is valid. *Owens v. Wake County*, 132.

2. The provisions of Article VII, sec. 7, requiring the approval of the voters for the issuance of bonds that are not for a necessary expense, applies to local matters relating to the affairs of the county separately considered, and not to a State-wide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made mandatory by our Constitution, Art. IX, secs. 1, 2, 3, requiring the maintenance of a six months term of public schools. *Ibid.*

3. While the building of highways, with bridges, culverts, etc., are recognized county necessaries, a general or special statute requiring the approval of the voters in order to a valid issue of bonds for that purpose, is necessary to be observed. *Ibid.*

4. In order to a valid issue of bonds by a county, under the County Finance Act of 1927, to purchase schoolhouses to comply with the mandate of our Constitution for a six months term of public schools, as a necessary county expense, without submitting the question to the vote of the people of the county, it is required that the resolution passed by the board of county commissioners so declare the fact to be, and the courts are without authority to supply the deficiency in the order. Const., Art. VII, sec. 7; Art. IX, sec. 3. *Hall v. Commissioners of Duplin*, 367.

b Public Purposes; Public Municipal Purposes

1. The Legislature is without Constitutional power to levy a tax or donate State property for any other than a public purpose, and the criterion for this question is whether the purpose aids the public through the prosperity of a class, or whether the public generally and directly will be helped. *Briggs v. City of Raleigh*, 223.

2. A municipality is without power to issue bonds or levy a tax for other than public municipal purposes. *Ibid.*

3. *Held*, under the facts of this case, the donation of land by the Legislature for a State Fair is for a public purpose, and is constitutional. *Ibid.*

TAXATION—*Continued.*

4. *Held*, under the facts of this case, the voting of bonds by a municipal corporation for the purpose of erecting buildings, etc., on land donated by the State, to be used for a State Fair to be operated within five miles of the municipality, is for a public municipal purpose, and is within the power of the city. *Ibid.*

c Constitutional Limit on Levy of Taxes for Current Expenses

1. A tax levied by the county commissioners for the aged and infirm, to pay jurors, for feeding and caring for the county prisoners are expenses to be paid from the general county fund as current expenses, and fall within the limitations of Article V, sec. 6, of the State Constitution. *R. R. v. Cherokee County*, 756.

2. A subsequent validating act of the Legislature cannot cure an invalid levy of taxes for general county expenses made under a former statute. *Ibid.*

C Exemptions.

a Charitable Institutions

1. Where no administrator of a deceased intestate has been appointed by the clerk of the court, and some of the parties claim under an alleged will unprobated, and the others as heirs at law, and a consent judgment has been entered by the judge, disposing of the property which has been accomplished by certain persons designated in the judgment as administrators or commissioners, excepting certain notes to be collected for two religious and charitable organizations: *Held*, the proceeds are the undivided property of the designated organizations as tenants in common, C. S., 7768, 7901, subject to division by the commissioners appointed by the consent judgment, and is not subject to taxation, and when paid under protest may be recovered. *Bank v. Commissioners of Yancey*, 678.

D County Commissioners May Correct Minutes of Levy of Taxes.

1. The board of commissioners of a county may correct the minutes of a levy of taxes formerly made by it to show separately the items relating to current county expenses and the items of levy for authorized special purposes when no change in the former levies are thereby made. *R. R. v. Cherokee County*, 756.

E Taxes on Transfer of Estates.

a Nature and Constitutionality

1. A statute imposing a tax upon the transfer of the estate of a decedent is not an inheritance tax, but a tax upon the right of devolution and transfer of property situate in this State, and is valid and constitutional. *Hagood v. Doughton*, 811.

2. Our State statute in basing the amount of tax upon the right to dispose of property situate in this State by will, etc., upon the amount deductible by the Federal statute for the benefit of the State, is not included in the amount to be received by the State as an estate or inheritance tax, but in addition thereto, and is not objectionable as an imposition of an arbitrary or capricious tax inhibited by Article I, sec. 17, of our State Constitution, or the Fourteenth Amendment to the Constitution of the United States. *Ibid.*

TAXATION—*Continued.*

3. Section 6, ch. 80, Public Laws of 1927, referring to the Federal statute allowing the State eighty per cent of the amount taxed by the Federal Government as a tax for the transfer of property by will or descent, is not objectionable on the ground that the amount of the tax is to be ascertained by reference to the Federal statute, or that the State statute authorizing it is not complete in itself. *Ibid.*

4. Section 6, ch. 80, Public Laws of 1927, by taxing the right to dispose of by will or devolution property situate in this State, does not interfere with the right of the Federal Government, or impose a burden upon it in the exercise of the power to tax the value of the estate. *Ibid.*

TEACHERS, Public School, Salaries see School and School Districts B a.

TELEGRAPHS.

A Contract with Sender.

a Claim to be Filed in Sixty Days

1. The printed stipulation on the back of a telegraph blank upon which a message is written, referred to in the printing on the face thereof, that the telegraph company would not be liable for damages or statutory penalties when the claim therefor is not presented in writing within sixty days after the message is filed with the company for transmission, is reasonable and valid. *Newbern v. Telegraph Co.*, 258.

2. Where a telegraph company receives for transmission a telegram ordering a carload of potatoes, and within the sixty days stipulated in the telegraph blank, the company is notified by a letter from the sender of its mistake in its transmission as to the destination of the shipment, and that damages had resulted therefrom: *Held*, sufficient claim to sustain the action of the sender to recover damages against the company for its negligence. *Ibid.*

TESTAMENTARY CAPACITY see Wills B.

TIMBER DEEDS see Deeds and Conveyances C.

TITLE OUT OF STATE, Presumption of see Ejectment A.

TORRENS DEEDS see Deeds and Conveyances E.

TORTS (Release from Liability for Tort see Release—Particular Torts see Specified Heads).

A Joint Tort-Feasors.

a Liability

1. The ordinary rule of law that there is no primary and secondary liabilities between joint *tort-feasors* is not varied by the exceptions arising in equity when in the joint tort each joint *tort-feasor* is charged with equal responsibility to the injured party and the combined, active and concurrent negligence of each equally causes the injury in suit. *Taylor v. Construction Co.*, 30.

TORTS—*Continued.*

2. When three parties contribute to the causing of a nuisance by impounding polluted waters, one by damming the stream and the other two by polluting the stream above the dam, they are joint *tort-feasors*, and are properly joined as defendants, and the payment by one to the plaintiff, under a prior condemnation proceedings, of consideration for the land taken for that purpose, and for depreciation to the adjoining land not taken resulting therefrom, does not release him from liability for the creation of a nuisance not contemplated in the condemnation proceedings, and therefore does not release the other two on this cause of action. *Moses v. Town of Morganton*, 92.

3. Joint *tort-feasors* cannot relieve one of their number from liability on a joint tort by executing a release to him. *Braswell v. Morrow*, 127.

4. A release of one joint *tort-feasor* by the receiver of a corporation that has caused loss by the tortious act, in full settlement of all claims of whatsoever nature and kind that the corporation has against him (or his estate) is sufficiently comprehensive to include not only the personal liability of the one released, but of them all guilty of the joint tortious act, and when founded upon a sufficient consideration will so operate. The difference between a release and a covenant not to sue distinguished by BROGDEN, J. *Ibid.*

5. One who has been injured while riding merely as a passenger in an automobile, and injured by the driver thereof acting wholly without her control or direction, and injured by the joint tort of the driver and another, she may sue them both for damages in the same action as joint *tort-feasors*, when the negligence of each concurs with the other in continuous and unbroken sequence in causing the injury complained of. *Ballinger v. Thomas*, 517.

6. Where two defendants are sued to recover damages for an alleged joint tort, and one of them alleges sole responsibility for the alleged negligent act on the part of the other, an issue as to primary and secondary liability does not arise. *Ibid.*

TOWNS see Municipal Corporations—Adverse Possession Against Unincorporated Town see Adverse Possession B.

TRESPASS—as Ground for Continuing Injunction see Injunctions A a.

TRIAL.

A Instructions (in Criminal Actions see Criminal Law and Titles of Specific Crimes—in Particular Actions see Specific Heads).

a Instructions Held Not Erroneous

1. Where an instruction of the court is clearly correct upon the principles of law arising from the evidence, it will not be held for reversible error that in one minute particular there was a semblance of error, when it is apparent that the jury could not have been misled thereby. *Taylor v. Construction Co.*, 30.

2. An exception to the charge that the word "substantial" was unduly repeated as to the damages recoverable is not sustained under the facts of this case. *Medlin v. Wake Forest*, 861.

TRIAL—*Continued.*

b Applicability to Pleadings and Evidence

1. In an action based upon undue influence and other issues as to whether the intestate by deed intended to divide his lands among his sons, and his personalty among his daughters, charging his sons certain amounts of money, as evidenced by their notes payable to him, but to be used for the benefit of his daughters, the matter is one to be determined by the jury according to the evidence and under proper instructions, and an instruction that the matter was one of adjustment of the rights of the parties by the court and jury, etc., and that the notes, being payable to the estate, would be distributed equally among the sons and daughters, virtually cutting out the daughters from a share of the estate, and that the jury were to consider this upon the question of undue influence, when the sons had waived their rights in the personalty, is reversible error. *Ingram v. Plott*, 138.

c Requests for Instructions

1. Where the charge of the judge to the jury is broadly sufficient and correct, it becomes the duty of the complaining party to ask for more specific instructions arising from the evidence, should he so desire. *S. v. Leonard*, 242.

2. The trial judge commits reversible error in failing to give substantially a material instruction duly requested, embodying a correct principle of law supported by the evidence in the case, though the evidence may be conflicting. *Parks v. Trust Co.*, 453.

3. Correct prayers for instructions, refused by the court, are not considered as reversible error when they are substantially given in the general charge. *Gower v. Carter*, 697.

d Conflicting instructions

1. Where the charge by the court to the jury is conflicting upon its material aspects arising from the evidence, the jury is not presumed to have understood the error, and a new trial will be granted on appeal. *May, Admr., v. Grove*, 236.

e When Error Cured by Verdict

1. An erroneous instruction is not cured by a verdict upon which the judgment appealed from has not been entered. *May v. Grove*, 236.

f Subject-matter

1. Where the attorneys of the parties litigant have by agreement written out their respective contentions and submitted them to the court without any objection taken at the time, it may not be successfully contended after verdict that it was erroneous for the trial judge in his instructions to give some of the contentions of the opposing party to the jury. *Porter v. Construction Co.*, 328.

B Nonsuit (in Criminal Actions see Criminal Law A a, and Specific Titles of Crimes—in Particular Actions see Specific Heads).

a On Motion of, Evidence Considered in Light Most Favorable to Plaintiff

1. Upon a motion as of nonsuit the evidence is to be taken in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom. C. S., 567. *Finch v. R. R.*, 191; *Newbern v. R. R.*, 258.

TRIAL—*Continued.*

b Time Motion Should be Made

1. A motion for judgment as of nonsuit may be granted or refused in the trial court only at the conclusion of the evidence. *Jernigan v. Neighbors*, 231.

c Right to Voluntary Nonsuit

1. It is not error for the trial judge to omit or refuse to sign a voluntary judgment as of nonsuit transmitted to him by the attorney of the defendant, or waive the appearance of the attorney in court, for the purpose of the motion. *Waddell v. Aycock*, 268.

d Evidence Held Sufficient to Go to Jury

1. It is error to grant a judgment as of nonsuit in plaintiff's action to recover for goods sold and delivered when there is evidence tending to show that a check marked paid, introduced in the trial, did not cover the transaction, though upon its face it purports to be "in full of all accounts to date." *Refining Corporation v. Saunders*, 140 N. C., 203, and other cases cited as controlling. *Oil Co. v. Moore*, 305.

2. In an action to enforce a contractor's lien, where the evidence is conflicting as to whether the contractor and the owner were in partnership, sharing the profits and losses in the construction of a building, and the defendant is the present owner by deed: *Held*, upon conflicting evidence upon this question, an issue is raised for the jury to determine, and a judgment as of nonsuit thereon is improperly entered. *Bolch v. Shuford*, 660.

3. A judgment as of nonsuit will not be granted when there is evidence to support the contentions of the adversary party. *Heaton v. Kilpatrick*, 708.

4. Conflicting evidence on the issues takes the case to the jury and overrules defendant's motion as of nonsuit. *Collins v. Lumber Co.*, 849.

D Verdict.

a Directed Verdict on Conflicting Evidence Properly Denied (Directed Verdict in Action to Establish boundaries see Deeds and Conveyances C 2).

1. A request for an instruction directing a verdict upon conflicting evidence is properly refused. *Porter v. Construction Co.*, 328.

2. A directed verdict to an issue is erroneous when the evidence thereon is conflicting. *Hatley v. Hammer*, 865.

b Form, Rendition, and Validity of Verdict

1. The verdict of the jury should be free from outside influence, and when a poll of the jury is demanded, it should be made upon the return of the verdict and before debate or discussion upon the merits, or upon motion to set aside the verdict; but when the verdict is rendered under a mistake as to the effect of an answer to one of the issues, a new trial will be awarded. *Lipscomb v. Cox*, 502.

2. When it is made to appear that a jury does not understand, at the time of its rendition of the verdict, instructions given them, it is

TRIAL—*Continued.*

not error for the trial court to further instruct them and have them again retire for deliberation, and when this is done, a judgment on the verdict is not erroneous. *S. v. Whittle*, 618.

E Arguments and Conduct of Counsel

a Unwarranted Abuse of Opposing Party

1. It is within the sound discretion of the trial judge, not reviewable on appeal unless grossly abused, either upon motion made, or *ex mero motu* to prevent an attorney for a party litigant in his argument to the jury from exceeding his privilege in drawing unreasonable inferences, and thus unwarrantably abuse the other party, or his witnesses. *Lamborn v. Hollingsworth*, 350.

TROVER AND CONVERSION.

A Acts Constituting Conversion.

1. The taking of the property of another, and in denial of his title, retaining possession and claiming and exercising the right of ownership is a wrongful conversion, upon which an action will lie. *Porter v. Alexander*, 5.

a Persons Liable

1. When the plaintiff was a subcontractor for the building of a State highway, and on abandonment of the principal contractor of the work, the plaintiff's property or materials has been sold with that of the original contractor, and the proceeds applied to the completion of the work by the surety on the contractor's bond, an action of conversion will lie, and the value of the plaintiff's property thus sold may be recovered against the surety on the bond of the original contractor. *Porter v. Alexander*, 5.

b Necessity for Demand

1. Where in an action of conversion, the plaintiff's property has been taken and converted by the defendant, and converted into money and used by it, it is not required that a demand for its value should have been made before the commencement of the action. *Porter v. Alexander*, 5.

TRUSTS (in Favor of Wife on Lands Purchased with Separate Estate see Husband and Wife C a—Limitation of Action to Declare Resulting Trust see Limitation of Actions A c—Judgment Providing for Disposition of Estate Creates Trust see Executors and Administrators B b).

A Constructive Trusts.

a Grounds Therefor in General

1. A parol trust cannot be engrafted on an unqualified fee simple with full warranty and covenant deed in favor of the maker in the absence of fraud, mistake, or undue influence. *Waddell v. Aycock*, 268.

B Appointment, Qualification and Tenure of Trustee

a Court May Appoint Trustee for Charitable Trust

1. Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or

TRUSTS—*Continued.*

the one designated fails or refuses to act, or one may be appointed under the provisions of our statute, C. S., 4023. *Benevolent Society v. Orrell*, 405.

C Management and Disposal of Trust Property.

a Right of Trustee to Lease

1. Where the trustee under a will is given full authority to lease a certain store, the property of the testator left in trust to pay first a certain part of the rental to a designated beneficiary in certain semiannual payments, to be made therefrom for life, the remainder of the rent to certain other beneficiaries, and then provides for a series of contingencies relating to the death and survival of such beneficiaries, with the final vesting of the title of the building upon a further contingency, a judgment of the court in which all contingent interests are properly represented, both as to those *in esse*, and those not *in esse*, all having the same interest, authorizing a lease for thirty years to be made by the executor and trustees under the will, which lease, under the table of expectancy, C. S., 1790, of the beneficiaries, would terminate before the trust, and would not interfere with the final devolution of the property according to the will, is valid and binding, and objection thereto on the ground that the lease may extend beyond the term of the trust is untenable. C. S., 1744, 1745. *Waddell v. Cigar Stores*, 434.

UNDUE INFLUENCE see Wills A—Instructions Upon see Trial A b 1.

USURY.

A Evidence.

a Parol Evidence

1. In an action to recover the amount of usury alleged to have been charged in a transaction for which the plaintiff has given his note reciting that the maker was justly indebted in the principal sum named, it may be shown by a parol contemporaneous agreement, as not coming within the statute of frauds, that the payee was to sell the note at an amount less than therein stated for the maker, and that he himself received no part of the discount that would bring him within the intent and meaning of the usury charge complained of. *Smith v. Trust Co.*, 183.

B Contract Not Usurious.

1. A fee paid by the borrower of money to an attorney for securing an extension of time on a note from the holder, without the latter's knowledge, who only receives the legal rate of interest upon the sum loaned, does not fall within the intent or meaning of our statute against usury. *Nance v. Welborne*, 459.

VENUE (Power of Clerks to Change Venue see Clerks of Court A b).

A Nature or Subject of Action.

a Interest in Real Property

1. When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase-money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve

VENUE—*Continued.*

an interest in or title to lands under C. S., 463(1), and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue. C. S., 469. *Causey v. Morris*, 532.

B Residence of Parties.

a Nonresident Plaintiff and Resident Defendant

1. Where a nonresident plaintiff brings action against a corporation existing under the laws of this State, with the joinder of a resident defendant, and the venue of the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, C. S., 469, and the action is removable thereto upon motion duly made by the resident defendant. *Brown v. Auto Co.*, 647.

C Appeals from Orders Relative to Venue.

a Appeals to Superior Courts

1. On appeal from the order of the clerk of the Superior Court ordering a cause transferred to another county as a matter of right, on the ground that the action involves an interest in lands, C. S., 463(1), the matter should be heard *de novo* during the term of court. 3 C. S., 913(a). *Causey v. Morris*, 532.

b Appeals to Supreme Court

1. The exercise of the court's discretionary power to transfer a cause to another county for the convenience of witnesses and to promote the ends of justice, C. S., 470(2), is not reviewable in the Supreme Court. But where, on appeal from the clerk's order removing the action on this ground and on the ground of movant's legal right, the court sustains the order on the latter ground alone, the clerk's right to issue the discretionary order is not presented on appeal to the Supreme Court, but the correctness of the order based on movant's legal right is left to be determined. *Causey v. Morris*, 532.

VERDICT see Trial D.

VESTED RIGHTS see Constitutional Law B a.

WAKE COUNTY, right to issue bonds see Taxation B a 1, 2, 3.

WAIVER of Appearance of Attorney on Motion of Voluntary Nonsuit see Trial B a 1—of Conditions of Contract see Contracts B b 1.

WARD see Guardian and Ward—Guardian of Insane see Insane Persons.

WARRANTIES see Deed and Conveyances B b.

WILLS.

A Undue Influence.

a Evidence thereof

1. When there is evidence upon the trial of a caveat to a will tending to show that the testator was a man of good mind and judgment at the time of the making of the will in question, that for some time

WILLS—*Continued.*

theretofore he had given much care and study to the disposition of his property and that the paper-writing admitted to probate in common form was in accordance with his desires frequently expressed to others who were not personally interested therein, and had nothing to expect therefrom: *Held*, further evidence that he had named his attorney as one of several executors therein, who had acted at his request, and had consulted with his wife and had asked her if she were satisfied with the disposition of the estate, is not alone sufficient to raise the issue of undue influence. *In re Will of Efird*, 76.

B Testamentary Capacity.

a Requisites

1. In order to make a valid will the mind and memory of the testator must be sufficient at the time to reasonably understand the extent and nature of the property he is disposing of and its distribution among those who may naturally have a claim upon him and the extent and manner he desires it to be distributed, with the further requirement that the will be in writing and signed by him, or by some person at his request, and also at his request witnessed by two persons in his presence. *In re Will of Efird*, 76.

b Requisites to Establish Testamentary Capacity

1. While it is only required that the caveator show the absence of one of the essential elements of the testator's mental capacity in order to set aside a will, the failure of the court, in his instructions to the jury, to recognize and instruct particularly as to each under the evidence, will not be held for reversible error, when it appears that the error was purely technical, and the jury, from the evidence and the charge construed as a whole were not misled thereby, but understood the law applicable to the case. *In re Will of Efird*, 76.

D Caveat Proceedings.

a Issues in Caveat Proceedings

1. While it is the better practice to submit two issues to the jury, when the pleadings and evidence raise them, one on the sufficient mental capacity of the testator and the other upon the question of undue influence, the latter becomes unnecessary when the evidence upon the trial is insufficient to have it considered, and no prejudicial error is committed by the court in relation to the first one. *In re Will of Efird*, 76.

b Parties Estopped by Caveat Proceedings

1. The heirs at law of a deceased testator whose will is duly probated, and who have no knowledge of proceedings to caveat the will, and who are not cited under the provisions of C. S., 4159, are not estopped to file a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded. *Mills v. Mills*, 595.

E Construction.

a Nature of Estates and Interests Created

1. When a testatrix devises certain lands to M. in fee, and bequeaths certain bank stock to W. with limitation over in the event he die

WILLS—*Continued.*

without heirs "his share" to the children of the brother of the testatrix, and by codicil "everything I have given M. to be given W. at her death": *Held*, the words "his share," in the bequest to W. refers to the identified shares of bank stock bequeathed to him and not to the real estate devised to M., in which he has a contingent remainder under the codicil to the will. *Trafton v. Flora*, 187.

2. When a testator has died leaving an estate from which he specifically excludes two of his children as his heirs at law, stating that he had given each of them, as advancements, his portion of the inheritance, and that they were to receive nothing as such heirs: *Held*, a codicil to the will providing for the upkeep of a burial place on the "home place," and also providing that should there be a residue of his personal property it should be equally divided among his heirs at law, refers to such heirs that were not excluded by the express terms of the will. In this case each of the excluded heirs had executed a recorded writing to the effect that he had received his full share of the inheritance, as stated in the will. *Brown v. Brown*, 315.

2. Where the testator bequeaths to his wife his property for life "without bond" and "gives" her the personalty of the estate "together with rents" from certain of his lands, and provides that at her death the lands shall be sold and the proceeds equally distributed between their children, and this appears in one clause of the will in connected sequence: *Held*, the word "give" applies to all the personalty bequeathed to the wife and the limitation over to the children equally applies, thus giving the wife only a life interest in the personalty other than that to be derived from the sale of the lands specified. *Williams v. Best*, 324.

3. A devise of the full beneficial interest in lands in trust as the rents and profits therefrom, vests the title and right of possession in the trustee, when not in conflict with the law against perpetuities, and when there is no clearly expressed intent of the testator that the lands and the income are to be separately regarded. *Benevolent Society v. Orrell*, 405.

4. Where the testatrix has provided in her will for the conversion of her real estate into cash, and in a residuary clause provides that the money shall be divided by the trustee named into four equal parts, one part to each of her two sisters, naming them, and if either of them be not living at the time of the testatrix's death then to the heirs at law of the deceased sister *per stirpes*, one part to her brother-in-law in fee, and one part to her brother, to be held by her executor in trust to invest and pay over to him the net proceeds "during his lifetime, and at his death to distribute the proceeds to his children who may be living at that time": *Held*, the children of the brother living at the time of his death take the *corpus* of the fund *per stirpes*. *Mangum v. Trust Co.*, 469.

5. A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies: *Held*, after the death of

WILLS—*Continued.*

the widow, the devise is not a trust created in the children as trustees for the "heirs of their bodies," and the devise not falling within the rule in *Shelley's case*, and there being no expression in the will to show an intent of the testator to create an estate of less degree than fee, C. S., 4182, it constitutes an estate tail, converted by our statute into a fee simple. C. S., 1734. *Washburn v. Biggerstaff*, 624.

6. A devise of "all of my property, both real and personal" to A. for life, with a later item "Whatever remains of my estate" to B. where there is no other disposition of the estate, vests the remainder in both the real and personal property in B. *Hass v. Hass*, 734.

7. Where a devise in remainder "it is my will that my real estate not be sold, but that the rents and profits for ninety-nine years be paid" to the authorities of a charitable institution for the use of the inmates, vests a fee simple absolute in the trustees for the use of the charity, being either the intent of the testator, or the limitation being void as an attempted restraint upon alienation. *Ibid.*

b Nature of Estates and Interests Created Under Rule in Shelley's Case (Under Deeds see Deeds B aa.)

1. A devise of lands to testator's two sons, J. and H., to be equally divided; to the former "to be to him, his heirs and assigns forever"; to the latter, "I lend to him for his use his lifetime, and at his death I devise to his heirs forever": *Held*, the word "heirs," as applied to the devise to H., is construed in its technical sense as carrying the estate to his entire line of heirs and according to the rule in *Shelley's case* H. takes a fee-simple absolute in the lands so devised to him. *Waddell v. Aycock*, 268.

2. The terms of a devise of lands for life with remainder to the heirs of the body of the first taker fall within the rule in *Shelley's case*, and as a construction of law, the title in fee passes to the first taker, without regard to the intent of the testator. *Bradley v. Church*, 662.

c General Rules of Construction

1. Where the testator has added codicils to his will the will will be construed with the codicils so as to effectuate the intent of the testator, as expressed by the entire writing. *Brown v. Brown*, 315.

2. A will does not admit of judicial interpretation when the words and phrases therein used, taken in their ordinary meaning in connection with the subject-matter, and from the writing as a whole, clearly and unmistakably express the testator's intent as what part of the estate each designated beneficiary is to receive thereunder. *Williams v. Best*, 324.

3. In construing a will the courts will reasonably reconcile apparent repugnancies, when this can be reasonably done; and to admit a legal interpretation of apparently conflicting intents the conclusion reached must be convincing. *Ibid.*

4. In construing a will the intent of the testator will be enforced as gathered from the related parts of the entire instrument. *Mangum v. Trust Co.*, 469.

WILLS—*Continued.*

5. In construing a will there is a strong legal presumption against intestacy. *Ibid.*

6. A devise of lands will be construed in favor of the early vesting of the title when this can reasonably be done. *Ibid.*

7. In construing a devise of lands the courts will give effect to the intention of the testator as expressed in the will, and may, for that purpose, reject, supply, or transfer words and phrases. *Washburn v. Biggerstaff*, 624.

d Designation of Devisees and Legatees

1. Where there is ambiguity in the terms of a will as to the identity of the beneficiary of a charitable trust, extrinsic evidence of identification may be liberally shown, when not in conflict with the terms of the written instrument. *Benevolent Society v. Orrell*, 405.

2. A devise of all the income and profits of lands in trust for a charitable organization of a certain church "to be used by the stewards of the church in defraying the expenses of the institution" is a sufficient designation of the stewards of that church as trustees for the execution of the trust contemplated by the instrument, and to vest in them the title and right of possession for its purposes. *Ibid.*

3. A devise to a State charitable institution will not be defeated for a mistake in the name, when the institution, existing under statutes which have slightly changed its name from time to time, was generally known, when the devise was made, under the name designated in the will. *Hass v. Hass*, 734.

4. The courts will take judicial notice of the name of an institution incorporated by the General Assembly for charitable purposes, and a slight error in the name of the institution in a devise will not defeat the gift if the intent of the testator as to the particular institution of that character is made to appear either by a construction of the writing or proper extrinsic evidence. *Ibid.*

5. Where a State charitable institution, incorporated by statute, and generally known at the time by a particular name, the use of this name by the testator is evidence that he intended this institution as the beneficiary, especially when there is no similar institution in existence. *Ibid.*

f Demonstrative Bequests and Rights of Legatees Thereunder

1. In disposing of a large estate by will, consisting of real and personal property, the testator devised by a certain item of his will to several legatees certain various amounts of money, to be paid by his executrix "out of the income from" his estate at her convenience, followed later by a general residuary clause: *Held*, construing the testator's intent from the whole written instrument, the legacies so given in the item were demonstrative bequests payable in money out of the gross income of the entire estate, bearing interest from one year after the qualification of the executrix, and any deficiency occurring is chargeable against the residuary legatee. *Shepard v. Bryan*, 822.

WILLS—*Continued.*

2. A demonstrative legacy is a bequest of money or other fungible goods, charged upon a particular fund so as not to amount to a gift of the *corpus* of the fund, or to evince an intent to relieve the general estate from liability in the event the fund fail, and so described as to be indistinguishable from other things of the same kind. *Ibid.*

F Probate.

a Will Probated in Common Form Not Subject to Collateral Attack

1. A will probated in common form is not subject to collateral attack, but is binding or conclusive until set aside in a direct proceeding. C. S., 4145. *Mills v. Mills*, 595.

X-RAY PICTURES as Subject of Expert Testimony see Evidence E a 1—Power of Court to Order X-ray of Injuries see Negligence C c.